Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Dale Michele Stingley

Petitioner

V.

Den Mar Inc.
Rail Unlimited Inc.

Respondent

On Petition For Writ Of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Pro Se Petitioner
Dale Michele Stingley
5613 Shady Hill Lane
Arlington, TX 76016
817 495-2937

The Questions Presented

The recent incarceration of Judge Samuel Kent, and the Fifth Circuit Judicial Council's mild response to serious sexual misconduct in that matter has done much to erode public confidence in the Fifth Circuits willingness to protect the rights of victims of Sexual Harassment in the workplace. The handling of Petitioner's case does nothing to quell those concerns.

1. Can the District Court use inherent sua sponte power to subject Petitioner to survival of summary judgment sexual harassment a second time after she has already survived summary judgment sexual harassment as a matter of law?

Inherent in the use of unpublished opinions is the capacity for countless litigants to be the victims of unjust rulings and a Court's unbridled arbitrary discretion to disposed of those injustices by unpublished opinions.

2. Has the Panel"s use of an unpublished opinion to dispose of Petitioner's case, after rendering an opinion in which significant facts were omitted, and significant evidence was ignored, subjected Petitioner to a process where concealing error, abuse, and the denial of due process rights is made possible by the lack of review and oversight of unpublished opinions, and by a system of inadequate checks and balances that ensures Constitutional protection of the rights of litigants from arbitrary judicial abuses?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dale Michele Stingley respectfully request this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the United State Court of Appeals for the Fifth Circuit, reported at (unpublished Opinion cite unavailable) ref 08-11061. The decision of the United States District Court for the Northern District of Texas, reported at (cite unavailable) see 4:07-CV-673-A . The order of the United States Court of Appeals for the Fifth Circuit, denying rehearing and rehearing en banc, is set forth at (see Fifth Circuit 08-11060)

JURISDICTION

The Court of Appeals' judgment was entered September 1, 2009. A timely petition for rehearing en banc was denied October 8, 2009. The jurisdiction of this Court is invoked pursuant to U.S.C. § 1254(1), which provides in relevant part that "[c]ases in the courts of appeals may be reviewed by the Supreme Court" "[b]y writ of certiorari."

STATUTORY PROVISION INVOLVED

Section 704 (a) of Title VII, 42 U.S.C § 2000e - 2(a), 3(a)

STATEMENT OF THE CASE

A. BACKGROUND

On October 9, 2006 pro se petitioner Dale Michele Stingley, (Stingley) began working as an office clerk for Den Mar Inc., Rail Unlimited Inc. A few weeks into her employment, she received an unsolicited after hours phone call from her supervisor John Muldrow (Muldrow). Muldrow initially stated that his call was to advise Stingley payroll checks would be available the following day, but eventually admitted during the conversation that he had called because he wanted to talk to Stingley. That phone call initiated a series of unsolicited evening calls, (Stingley estimates 15-20 calls over her first 30 days of employment). During the calls, Muldrow would suggest that they meet out. The tone of the phone calls became more inappropriate, and suggestive. Muldrow would make remarks like, "you know you want me" or ask Stingley, "Do you like chocolate?", referring to his very dark skin tone.

Muldrow's inappropriate conduct progressed to Inappropriate actions in the office where he trained Stingley, and worked alone with her at times. November 6, 7 ,8th of 2006, Stingley was subjected to repeated groping by Muldrow and having to physically remove his hands from her person in the office. Muldrow placed his hand on Stingley's inner thigh under the desk while training her. His inappropriate actions continued and progressed to Muldrow exposing himself to Stingley on the job.

On November 10, 2006 a month into Stingley's employment, she contacted Den Mar Inc. H. R. Manger Kenneth Doak (Doak) to advised him of Muldrow's inappropriate conduct. A few days (4), after being informed of Stingley's complaint, Muldrow resigned his $52,000 a year position by failing to report to work. Doak, in a letter to Stingley dated November 17, 2006 advised Stingley that Muldrow had resigned, and that "he felt the companies obligation to protect her from Muldrow ended with Muldrow's departure". Doak's admission of a need to protect Stingley is probative, because the female clerk Stingley was hired to replace, left her position abruptly, and Muldrow had bragged to Stingley about having gotten out of the same bed with that female clerk the morning of the day she quit. An investigation to determine the scope of the sexual harassment problem or if other employees had been affected was never conducted.

On December 30, 2006, Stingley filed a follow up complaint related to her initial complaint of sexual harassment, advising Doak that Muldrow continued to call the office. Muldrow knew that it was Stingley's job to answer the phone. Muldrow was also seen several times on company premises by Stingley. Ron French (French), Muldrow's replacement as Ramp Manager, was fully aware of of Muldrow's calls and visits. No Den Mar Inc. representative took action to ban Muldrow from calling the office where Stingley was responsible for answering all calls including Mudrows, subjecting her to further harassment. After Stingley refused to hold conversations when Muldrow called the office, Muldrow continued calling the office but

began asking for Nina Tillmon, (Tillmon.). Tillmon was an office clerk that handled personnel matters. Tillmon who was a friend of Muldrow's, was hired by Muldrow and worked in the small office with Stingley. Muldrow discussed details of the sexual harassment including him exposing himself, and his abrupt resignation with Tillmon. Tillmon took great exception to Muldrow resigning as a result of Stingley's sexual harassment complaint, stating on one occasion in the office with Stingley present "she was mad because John had quit". Muldrow's calls influenced and perpetuated hostilities in the office that began with his inappropriate conduct. Tillmon in turn discussed details of the sexual harassment based on Muldrows account of his conduct and Stingley's complaint, with other employees. A document dated January 26, 2007 and signed by French, details a discussion French had with Tillmon after Stingley's second complaint. That document confirms based on information French obtained directly from Tillmon, that Muldrow continued to call the office where Stingley and Tillmon worked, and that Tillmon discussed details of the harassment (she had gotten from Muldrow) with other employees. French in that document stated that "Tillmon did not deny discussing details of the sexual harassment or Stingley's complaint with other employees". Tillmon made a verbal threat of physical violence against Stingley in the office the day after speaking to French and left her job after learning that Stingley had reported the threat to Doak and French.

Neither the departure of Muldrow, or Tillmon put an end to the hostile work environment. The hostile treatment continued, ultimately resulting in Stingley being wrongfully terminated by permanent layoff. On March 17, 2007 Stingley was laid off by French after she left a note on French's desk (March 12, 2007) complaining about the continuation of hostile and abusive treatment in the office.

French became upset with Stingley during a call she made to him to advise him that someone was waiting in the office to see him, and spoke to her in a loud and abusive tone. Stingley complained and five days later was wrongfully terminated. Stingley was the only employee laid off at the Arlington Den Mar Inc., facility, and evidence in the record shows the layoff was retaliatory and pretextual.

B. DISTRICT COURT PROCEEDINGS

On November 7, 2007 Petitioner filed a claim in U. S. District Court in the Northern District of Texas. Stingley's claims, as reflected in her complaint are sexual harassment, hostile work environment, and wrongful termination. The Court immediately instructed Stingley to file an amended complaint and to state her claims with specificity, in effect subjecting pro se plaintiff to a heightened pleading standard, as Rule 8 requires only a short plain statement. While Stingley was subjected to heightened standards by the District Court on more

than one occasion, Respondents counsel was allowed to practice and to submit documents to the District Court without being admitted to practice for the first 3 three months of this action. Petitioner's Motion to Sanction that violation was denied by the Court. (see app. at 15a,46a)

On September 10, 2008 the District Court issued an Order Granting Defendants Summary Judgment in part and denying it in part. Defendants Motion for Summary Judgment Sexual harassment was denied because of their improper reliance on *Woods v Delta Bev Group, Inc.*, 274 F. 3d 295-298 (5th Cir. 2001) (the standard for co worker sexual harassment) Stingley's alleged harasser was her supervisor. The September 10th Order was never deemed erroneous, nor was it ever vacated or amended.

On September 12, 2008 the Court issued an Order giving Petitioner notice of it's "inclination to dismiss her sexual harassment claim sua sponte, on grounds that the alleged harassment did not effect a term or condition of her employment". This move by the court was unwarranted, as Defendants were never entitled to summary judgment. The District Courts requiring Petitioner to survive summary judgment twice is error, and an abuse of the Courts power.

On September 10, 2008, the District Court denied a Motion filed by Stingley to Compel company cell phone records of Muldrow from Den Mar Inc., Rail Unlimited Inc., after the companies refused to produce those documents during discover. The Court

delayed ruling on that motion (for reasonable and necessary discovery) for over 30 days, rendering that decision 2 days before the discovery clock expired, leaving Stingley (who is pro se) with no time to obtain those records. This delay by the Court violates *Canon 3(a)(5)* which requires that "a judge dispose promptly of the business of the court" and was prejudicial to Petitioner's case. Ironically, the court then moved sua sponte to assert Stingley's inability to prove that the harassment did not affected a term or condition of her employment. The phone records would have helped to establish the pervasiveness of the harassment as Stingley was being harassed day and night.

On October 3, 2008, the District Court issued an Order granting sua sponte Summary Judgment Sexual Harassment for Defendants, dismissing Stingley's claim in it's entirety, even though Stingley had already survived Summary Judgment Sexual Harassment and Defendants were not entitled to Summary Judgment Sexual Harassment as a matter of law. The Court's initial Order denying Defendants Motion for Summary Judgment Sexual Harassment was never called an error by the court, was never amended, and never vacated. The Court subjected Stingley to a form of civil double jeopardy as she had survived summary judgment once and had established a prima facie case of sexual harassment.

C. THE FIFTH CIRCUIT'S RULING

On September 1, 2009 the Panel issued an Order affirming the District Courts Order in this matter. Petitioner filed a timely Petition for Rehearing En Banc. Petition for Rehearing En Banc was denied October 8, 2009. The Panel relied on the District courts inherent sua sponte power and bare assertions by the court as a basis for affirming the Courts sua sponte dismissal of Stingley's Sexual Harassment and all other claims. The Panel failed to address the District Court's initial Order in which Respondents failed to meet their Summary Judgment burden and the fact that the initial Order denying Respondents motion for summary judgment sexual harassment was never disposed of by the lower court.

The Panel ignored significant evidence contained in the record in their ruling, choosing instead to rehearse erroneous facts asserted by the District Court. Both Opinions are replete with tenuous mischaracterized assertions made by the Court and the Panel, glaring failures to consider evidence in the record, factual omissions, and errors of law and procedure by the court and The Panel resulting in gross injustice for Petitioner.

Neither the lower court or the Panel bother to address, much less consider, the severity of the alleged harassment that included repeated groping and exposing of Muldrow's genitals.

The Panel and the District Court also ignored other evidence in the record including the January 25,2007 document signed by French that confirms Muldrow continued to call the office influencing hostilities. The record also contained evidence of a threat of physical violence made by Tillmon to Stingley in the office, "I ought to beat your mother fucking ass". This threat is documented by French and was part of the record prior to the lower court's sua sponte consideration. A letter from H.R. Manager Doak to Stingley, apologizing on behalf of the company for the "uncomfortable nature" of the harassment, and Muldrow's signed resignation, that evidences his abrupt resignation from his $52,000 a year position four days after Stingley filed her complaint, were significant and probative but ignored.

These documents along with other pleadings and documents clearly establish the pervasive and serious nature of the harassment, and the level of hostilities Stingley was subjected to. Stingley was then wrongfully terminated by layoff in retaliation for objecting to the hostile work environment that resulted from the harassment. Respondents assert the layoff was company wide but Stingley was the only casualty of that lay off at the Arlington facility. This action was materially adverse causing an abrupt loss of income for Stingley.

The Panels repeated misrepresentations of the record, along with omissions and ignoring significant evidence in the record, is conduct that far exceeds

harmless error. The actions of the Panel and those of the District Court violate the principals of due process, and the rule of law. If the Panel's actions in this case are a reflection of business as usual in the Fifth Circuit, then the very system of justice put in place by our nations founders and Congress to administer justice, has become a threat to that justice. The Panels opinion is replete with error and abuses.

REASONS FOR GRANTING THE PETITION

I. District Court's Abuse of Sua Sponte Power

The Panel's affirming of the District Courts decision raises significant and far reaching legal questions, as does the Panel's abusive use of an unpublished opinion in this case.

If a District Court possesses inherent power to arbitrarily force litigants to survive Summary Judgment twice on the same issue when as a matter of law Defendant's were not entitled to that ruling, and the Court has signed an Order to that effect, the rights of all litigants are in jeopardy and are subject to the whims of Federal Judges.

This action was filed by pro se Petitioner after she had been subjected to a severe case of sexual harassment in the workplace. Within the first 30 days of her employment, Stingley's supervisor Muldrow, who was responsible for training her, subjected Stingley to a barrage of inappropriate actions including repeated unsolicited after hours phone calls,

repeated groping in the office, and exposing himself to her on the job.

The District Court subjected pro se Petitioner to heightened standards in two significant instances. Stingley was Ordered by the District Court to amend her initial complaint to state with specificity her claims against Defendant's Den Mar Inc., Rail Unlimited Inc., when *Rule 8(a) (2)* of the Federal Rules of Civil Procedure only requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Stingley was also required to survive Summary Judgment Sexual Harassment twice in clear violation of *Fed. R. Civ. P. 56(c)* "Summary judgment is appropriate when "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law". On October 10, 2008 the District Court issued an Order that denied Defendant's Motion for Summary judgment Sexual Harassment. The Court's basis for the decision as stated in the Order was Defendant's improper reliance on *Woods v. Delta Bev. Group Inc.,* 274 3d. 295, 298 (5th cir. 2001), thus Defendants were not entitled to summary judgment as a matter of law. The Courts Order states:

"The Fifth Circuit distinguishes between cases in which an employee asserts a Title VII sexual harassment claim alleging that a supervisor with immediate (or successively higher) authority harassed her and cases in which the harasser is a co-worker. In the former situation, the employee need only satisfy the first four elements of the aforementioned test. In

the latter situation, we made clear that the employee must satisfy all five elements". It is undisputed that the plaintiff's alleged harasser was her immediate supervisor; thus plaintiff is not required to establish the fifth element. As defendants have offered no other grounds for summary judgment on plaintiff's sexual harassment claim, the court will deny summary judgment as to that claim". (See App. at 26a)

Stingley survived Summary Judgment sexual harassment, and had established a prima facie case of hostile work environment sexual harassment, only to have the Court move the goal post and resort to sua sponte action in an abuse of power.

This ruling conflicts with Federal Rules of Civil Procedure, legal precedent, and circumvents the Petitioners pursuit of justice. Inherent power must be invoked with utmost caution particularly where the matter under consideration "is governed by other procedural rules, lest the restrictions of those rules become meaningless, *G.Heileman Brewing Co., Inc. v Joseph Oat Corp*, 871 f.2d 648, 652 (7th Cir. 1989). Where the rules directly mandate a specific procedure to the exclusion of others, inherent authority is proscribed" (citation omtted); *Natural Gas Pipeline Co. Of Am. v Energy Gathering, Inc.*,2F. 3d 1397, 1407 (5th Cir. 1993).

The Panel' displayed wanton disregard for the Rules of Civil Procedure, and a troubling disregard for evidence in the record, offering erroneous facts or omissions. The Panel, in it's

unpublished decision, does not mention or address the severity of the alleged harassment, nor consider that Muldrow's alleged actions included groping, a series of 15-20 unsolicited calls to Stingley's home, and exposing himself all within the first 30 days of her employment. The Panel offers a sanitized version of the record, (see app. at 3a,4a) omitting facts, and focused instead on it's illegitimate application of *Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (2986) affirming the courts sua sponte action stating "It is well settled that a district court can grant summary judgment sua sponte so long as the adverse party had notice to come forward with all of it's evidence" The Panels failed to consider the fact that Stingley had already survived Summary Judgment in a lower Court Order. There was no justification for resorting t o sua sponte action in light of the Courts own recognition that Defendant's were not entitled to summary judgment sexual harassment as a matter of law. (See App. at 25a)

The Panel affirmed the lower Courts assertion that Stingley bore the burden of going beyond pleadings in presenting evidence to establish a genuine issue of material fact on the issue of harassment affecting a term or condition of her employment, (an issue not raised by Respondents). In light of the lower Court's own determination that Defendant's were not entitled to Summary judgment sexual harassment, this assertion is tenuous and sua sponte action was an abuse of power.

As a matter of law, the summary judgment burden never shifted to the non movant. Fed.R.Civ. P. 56,

reads in relevant part " that the moving party must be entitled to judgment as a matter of law". Stingley, through pleadings, affidavit, and other documents of evidence on the record but ignored by the Court and the Panel, established a prima facie case of Sexual Harassment as (1) she belonged to a protected class, (2) she was subjected to unwelcome sexual harassment (3) the harassment was based on sex, (4) the harassment affected a term, condition, or privilege of employment. See *Lauderdae v Texas Dept. Of Criminal Justice, Inst. Div., 512 f. 3d 157, 162-163 (5th Cir 2007)*

The Panel goes on to offer another in a series of misrepresentations by asserting that evidence submitted by Stingley in response to the Court's sua sponte motion "did not constitute competent summary judgment evidence, and that documents submitted by Stingley, (namely an affidavit with exhibits) were unverified". *Rule 11(a)* of the Federal Rules of Civil Procedure reads in relevant part, " every pleading, written motion, and other papers must be signed by at least one attorney of record or by a party personally if the party is un represented, unless a rule or statute specifically sates otherwise, a pleading need not be verified". Petitioner is pro se and is an un represented party. The rules do not demand that all documents be verified as the district court suggested and the Panel affirms. All documents submitted to the court by Petitioner prior to, and during summary judgment, were either certified by Petitioner or verified by a Notary, and have met the Rules requirement.

As a matter of law, *Fed. Rule of Civ P. Rule 11(a)* requires that the Court "strike from the record and deem deficient any document submitted to the Court that was not properly signed", the court has a legal obligation to do so. No such action was taken against Petitioner, thus the Panels assertions are false and egregious.

The Panel asserts that Stingley did not make a claim of sexual harassment in her affidavit. The purpose of the affidavit submitted by Stingley was to refute misrepresentations of some relevant facts contained in an affidavit submitted by H. R. Manager Kenneth Doak (Doak). Stingley's affidavit did however, confirm Doak's account of the initial phone call that she placed to his Oklahoma City office on November 10, 2006. Doak's affidavit details Stingley's complaint of Muldrow's harassment. Stingley's affidavit affirmed that Doak's account of her initial complaint is accurate, thus, in the summary judgment phase, Stingley's complaint was offered as competent summary judgment evidence by Doak. Doak's affidavit exhibits also contained a copy of his letter to Stingley dated November 10, 2006, in which he apologizes on behalf of the company for the "uncomfortable nature" of the circumstances that were the basis of her complaint. This is a direct reference to the alleged harassment, and a documented inference (with probative value), that he deemed Stingley's complaint credible. An apology on behalf of a company would not be offered if the company feels no harm has been done.

Stingley's claims of sexual harassment had been established in other documents and pleadings in the record, and did not need to be re-asserted in her affidavit. Stingley followed the exact same pattern in submitting her summary judgment affidavit with attached exhibits as Respondents. Both parties submitted a single affidavit and attached exhibits that were signed by a notary, along with a certificate of service, yet the District Court and Panel call Respondents submission verified, and Stingley's submission unverified in an act that must be deemed disparate and prejudicial. *Rule 56(c) of the Federal Rules of Civil Procedure* establishes that "during summary judgment, the judgment sought should be rendered if the pleadings, discovery and disclosure materials and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment". The entire record must be considered. The Panels fixation with the one affidavit submitted by Stingley while ignoring other significant and compelling documents of evidence in the record is troubling because of the lack of diligence (or judicial malfeasance) it represents.

The Panel improperly relied on *King v. Dogan,* 31 F.3d 344, 346 (5th Cir. 1994) when affirming the Court's decision. In *King*, the Panel ruled that pro se plaintiff King submitted a complaint during summary judgment that was not verified with no other evidence. The ruling in King has no baring on Petitioner's case. The record clearly evidences that all documents submitted by Stingley in this case were

either certified or verified as required by the Federal Rules of Civil Procedure, and the record contains compelling evidence to support Petitioner's claims. The larger issue is the failure of the District Court and The Panel to consider all of the evidence in the record, and the failure of both the lower Court and The Panel to follow the mandates of legal precedence and Federal Rules of Civil Procedure.

Significant evidence was part of the record before the lower court's sua sponte action, including a document signed by Ron French. This evidence was compelling and went beyond claims and assertions made in Stingley's complaint. This statement, signed by a Den Mar Inc., manager, confirmed Muldrows continued harassment and influence on the hostile environment. It warranted consideration by both the Court and The Panel but was ignored.

The District court and The Panel also ignored evidence that the female clerk Stingley was hired to replace, left her position abruptly and Muldrow bragged to Stingley that he had " gotten out of the same bed with her" the morning of the day that she quit. Respondent's identified that female by interrogatory during discovery.

The Panel was content to rely on and to present false assertions masquerading as fact, pointing to no evidence offered by Respondents that eliminated material fact issues on the sexual harassment claim.

II. Panel Decision Conflicts With Other Circuits

The Panel affirmed the lower Court's grant of sua sponte summary judgment sexual harassment, affirming that Stingley did not provide evidence that the alleged harassment was severe or pervasive as to alter her working conditions, or create an abusive environment. This question generally presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986). The record amply supports Stingley's claim of sexual harassment and respondents never raised any issues regarding Stingley's credibility. During Stingley's initial call to Doak, his response to Stingley was "I've been waiting for this call". A clear indication that he knew or believed Muldrow was a problem.

"The hostile environment "question is commonly one of degree --both as to severity and pervasiveness- to be resolved by the trier of fact on the basis of inferences drawn from a broad array of circumstantial and often conflicting evidence." *Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 474 (1st Cir. 2002) quoting Lipsett v. Univ. Of Puerto Rico, 864 F. 2d 881, 895 (1st Cir. 1998).* The Panel's assertion that the circumstances Stingley was subjected to did not constitute harassment that was both severe and pervasive is without merit.

In order to conclude that a term or condition of Stingley's employment was not affected, and that

the harassment was not severe or pervasive, the Court and the Panel had to completely disregard the following evidence in the record, (which was in the record prior to the Court's sua sponte consideration). The document signed by Muldrow proving that he abruptly resigned within days of learning of Stingley's sexual harassment complaint, respondents refusal to produce Muldrow's company cell phone records during discovery, the written apology from Doak to Stingley for the alleged harassment, the abrupt resignation of the previous female clerk and Muldrow's admitting to " sleeping in the same bed" with her. The January 26, 2007 document signed by French where he documented the fact that Muldrow was still calling the office as late as January 25, 2007, perpetuating the harassment and directly influencing a hostile environment, and the documented threat of physical violence Tillmon made to Stingley January 25, 2007, in the office, "I ought to beat your mother fucking ass". None of this evidence is mentioned or considered.

The Panel also ignored the facts that Stingley alleged she had been repeatedly groped in the office by Muldrow, that she had received 15-20 unsolicited after hours phone calls from Muldrow and that Muldrow exposed himself while on the job, all within the first 30 days of her employment. When a court evaluates a motion for summary judgment, [t]he evidence of the non-movant is to be believed" *Anderson v. Liberty Lobby, Inc.*, 477 U.S, 242, 255 (1986).

The Panel and District Court by their rulings

suggest that a reasonable person would expect to have to tolerate being subjected to these extreme conditions in the workplace. The willingness of the Panel to overlook a record of documents that evidenced the existence of a severe and pervasive case of hostile work environment sexual harassment, is unconscionable. The harassment must objectively and subjectively alter a term or condition of employment. "A sexually objectionable environment must be both objectively and subjectively offensive, one a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so" *Faragher v. City of Boco Raton, 524 U.S. 775, 787 (1998)* Stingley considered the environment hostile.

The Panel's ruling conflicts with that of other circuits. A hostile work environment is shaped by the accumulation of abusive conduct, and the resulting harm cannot be measured by carving it into a discrete series of incidents); *Jackson v Quanex Corpl,* 191 F. 3d 647, 659 (6th Cir. 1999) Behaviour like fondling, come-ons, and lewd remarks is often the substance of hostile environment claims. "Sexual remarks and innuendos, " including " "a sexual invitation," as well as "unwelcome physical touching"); *Crowley v L.L. Bean, Inc., 303 F.3d 387, 397-98 (1st Cir. 2002).* If the harassment interfered with plaintiff's job performance, or made it more difficult for her to do her job, or if the harassment changed the way people treated her on the job, answering these questions helps resolve the issue of whether the harassment affected a term or condition of employment. *Holbrook v Reno,* 196F 3d 255, 262-263 (D.C. Cir. 1999);

(determination necessarily entailed a fact-specific assessment of all the attendant circumstances).; Carter v Chrysler Runyon, 132F. 3d 1214, 1222 (8th Cir. 1997).

False assertions made by the Panel distract from the real issue at hand, which is the Panel's failure to exercise the diligence required for proper review of this case and the Panels strident disregard for legal precedent among the circuits and that of the U. S. Supreme Court.

It should be noted that the untrue assertions by the lower Court that Stingley submitted unverified documents and documents that were not competent summary judgment evidence, were made during the sua sponte summary judgment phase of this case, not during the initial summary judgment phase, though the Court had opportunity to make those assertions at that time. This evidences the lengths to which the District Court was willing to go, ignoring it's own initial ruling and significant evidence in the record to conjure up it's ruling.

Petitioner submitted evidence that ranges from compelling to probative in value, all of which was completely ignored by the lower Court and The Panel. "The Court must look to the totality of the circumstance, including "the frequency; its severity; whether it is physically threatening or humiliating. *Harris, 510 U. S. at 23.* The court "must assume the truth of all statements proffered by the party

opposing summary judgment" -- except for wholly conclusory statements for which no supporting evidence is offered. *Greene v Dalton, 164 F.3d 671, 674-75. (D.C. Cir. 1999)*. In considering a motion for summary judgment, "the court must draw all reasonable inferences in favour of the nonmoving party, and it may not make credibility determinations or weigh the evidence". *Reeves v. Sanderson Plumbing Prodl, 530 U. S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); see also Washington Post Co. V. U. S. Dept of Health and Human Servs. 865 F. 2d 320, 325 (D. C. Cir 1989).*

Petitioner was subjected to a process that has done more to impede than to administer justice. The cumulative effect of legal and procedural indiscretions by the Court and the Panel results in manifest injustice for Petitioner.

III. No Basis In Fact for Panel Opinion

Defendant's Summary Judgment brief went to great lengths to distorted the record by falsely asserting that Stingley's claims were sexual harassment, retaliation, and retaliatory discharge. Stingley's second amended complaint as documented in the record shows Stingley's complaint to be "sexual harassment, hostile work environment, and wrongful termination (in retaliation for opposing the hostile work environment created by sexual harassment)" (see App at 42a). The District Court's acceptance of Defendant's distortion of Stingley's claims was the

beginning of a pattern by Defendant's and the lower Court to use tenuous assertions that conflicted with the record. The lower court allowed, and proffered significant distortions as the basis of it's sua sponte ruling instead of Petitioner's claims as evidenced in the record. The Courts actions made it impossible for a just conclusion to be reached, as the Court and The Panel were complicit in offering inaccurate and erroneous accounts of the facts on which this case could turn, using those distortions as the basis for it's sua sponte ruling in Defendants favour.

Stingley clearly established a prima facie case of hostile work environment sexual harassment. (1) she belonged to a protected class, (2) she was subjected to unwelcome sexual harassment (3) the harassment was based on sex, (4) the harassment affected a term, condition, or privilege of employment.

Muldrow's harassment was discriminatory conduct based on sex. No men were subjected to the same treatment and Muldrow conducted himself inappropriately with the female office clerk that Stingley replaced. "Evidence that others of the same sex were subjected to hostile work environment is extremely probative in determining that harassment is based on sex". See *Hurley v Atlantic City Police Dept.*, 174 F.3d 95, 109-111 (3d. Cir 1999). Petitioner did belong to a protected class and had been subjected to unwelcome sexual harassment that affected a term or condition of her employment.

IV. GROSS FAILURES REVIEWING THE RECORD

The Panel added to the convolution of the distorted facts proffered by the District Court by asserting the following. "Stingley also appeals the district court's decision on her retaliation and retaliatory discharge claims". The Panel in this instance, disregarded Stingley's claims as evidenced in the record and in so doing, was complicit in putting Stingley's case in jeopardy because decisions in this case were not based on Stingley's stated claims. In order for a court to reach a just conclusion, it must consider the facts as presented in the case and not manufactured offerings. The lower Court in it's initial Order in which Summary Judgment was denied for Defendants states the following;

" Section III. B. Of defendant's motion addresses a purported retaliation claim by plaintiff regarding the actions of a coworker, Nina Tillmon. However, in her response, plaintiff denies any intent to bring a claim against Tillmon and confirms that her only complaint of retaliation concerns the alleged acts of defendant's.Pl's Resp. At 16. Therefore, the court need not address defendant's arguments regarding Tillmon." (see App. at 21a)

Here, the lower Court in it's own Order acknowledges that Stingley's retaliation claim was against Defendant's and not Tillmon, yet the lower Court proceeds to rule on a distorted version of facts and the Panel affirms these factual distortions.

" In both civil and criminal cases, in the first instance and on appeal, courts follow the principal of party presentation, i.e., the parties frame the issues and the courts generally serve as neutral arbiters of matters the parties present. *See Castro v. United States, 540 U.S. 375, 381-383* The Court and the Panel have assisted in framing of the issues in this case.

Petitioner has been subjected to a process that has denied the fundamental fairness demanded in review of all competent, and material evidence contained in the record. Petitioner who is pro se, has also suffered the burden and expense of an appeal, and a now a Petition for Certiorari, in order to preserve her claim of sexual harassment.

The Court did not deal with the two remaining components of Defendant's Motion for Summary Judgment as presented to the court, (Retaliation and Retaliatory Discharge), but merged the two components, then compounded that error by ruling on an issue not raised by Defendant's, while providing no notice to Petitioner, or an opportunity to respond to an issue raise by the Court and not by Defendants. The Panel affirmed this sua sponte action by the Court.

Defendant's in their motion raised the issue that "Plaintiff cannot establish that she was subjected to any adverse employment action" The lower Court as the basis for it's ruling, raises a totally different issue, stating plaintiff "failed to establish a prima

facie case of retaliation because she did not engage in a protected activity contemplated by Title VII, an issue Defendant's had not raised. (see App. at 27a) Notice that a particular element of a cause of action is being challenged does not put a party on notice that every element is being challenged. See *Washington v Resolution Trust Corpl, 68F. 3d 935, 939 (5th Cir. 1995) Fed. R. Civ. P. 56(c)* mandates that the losing party must "be afforded notice and reasonable opportunity to respond to all the issues to be considered by the court" *Employers Ins. Of Wausau v Petroleum Specialties, Inc., 69F. 3d 98, 105 (6th Cir 1995).* This ruling was an abuse of power and the Panels affirming was error.

The facts and evidence of the case were never viewed in the light most favourable to the non-movant. The District Court and The Panel have ruled based on false premises.

The Panel Opinion suggest that Muldrow;s harassment, the hostile work environment, and the adverse employment action taken against the Petitioner, (termination by pretext of layoff), are all unrelated. This case is a series of chain reactions, that began with Mudrow;s inappropriate conduct, and ended with Petitioner's wrongful termination. But for the actions of Muldrow during calls to the office, divulging information to Tillmon about his inappropriate conduct, Stingley's complaint, and his resignation, Tillmon's discussion of those matters with other employee's would not have existed.

Tillmon became a conduit for Muldrow's harassment as a result of his constant influence on her. Tillmon was so influenced by Muldrow's calls to the office, that she ultimately tells Stingley in the office, "I ought to beat your mother fucking ass." This threat is is part of the record, and represents more than a petty office slight.

A document on the record, (Doak's phone record) shows that Doak called French in response to a call Stingley made to him (Doak). Doaks states that Stingley told him "nothing was being done about the hostile work environment". Doak's phone log provides evidence that Stingley's problem in the office with Tillmon was a hostile work environment not retaliation.

Respondents ascribing retaliatory action to Tillmon was done to positions defendants to argue that no adverse employment action was taken against Stingley because Tillmon had no authority over Stingley. The record contains clear and compelling evidence to support Stingley's retaliatory claim. A note left on French's desk March 12, 2007 by Stingley, in which she complained about the continuing existence of a hostile work environment even after Tillmon quit, is the causal link of the retaliation (.see App. at 23a). The note provides evidence that Stingley had spoken to French about his hostile treatment of her as early as shortly after Muldrow left. Stingley was laid off five days after making that complaint to French.

The lower Courts ruling based on false assertions is troubling, because the Court appears to assist Respondents, while prejudicing Petitioners case. The Court assisted Defendants by ruling on an untrue version of facts that the record amply discredits. The Court grants illegitimately what Defendants could not accomplished on the merits. The lower Court's sua sponte action granting Summary Judgment Sexual Harassment after determining Defendants were not entitled to that ruling as a matter of law is another example of the Court taking action to bring about a results Respondents were not entitled to on the merits and the Panel affirmed.

The District Court and The Panel, by their respective decisions, infer that Stingley's wrongful termination was not pre textual or the result of anything actionable under Title VII. The record conflicts with those conclusions. The hostile work environment was a direct result of Muldrow's sexual harassment, Stingley's complaint, and Muldrow's subsequent calls to the office where he first attempted further communication with Stingley, and then began influencing Tillmon.

A complaint about a hostile work environment that resulted from a complaint of sexual harassment is actionable under Title VII, as is retaliation against an employee who has made a complaint.

In the March 12, 2007 note, Stingley complained to French about his on going hostile treatment and was terminated five days later. French earlier that day, became upset, speaking to Stingley in an abusive tone after she called him to tell him someone was in the office waiting to see him. French kept the man waiting so Stingley called a second time to remind him someone was waiting and French became upset.

Nothing about the situation warranted such a hostile reaction. French's reaction is very telling and is an indication of the level of hostility French had toward Stingley after she filed her complaint. In isolation, this action by French may seem like nothing more than rude behaviour, but in the context of the severely hostile work environment, Stingley perceived French a part of the whole of that environment. The note protesting hostile treatment is the causal connection to the wrongful termination.

Hostilities with French and Tillmon began with Stingley's initial complaint. In notes taken by Doak during Stingley's initial call to him (and in the record), Doak notes Stingley advised him French had witnessed Muldrow's inappropriate behaviour on one occasion but did not reported it.

On March 17, 2007 French advised Stingley that she was being laid off and emphasized the fact that

the lay off was "permanent". Seasonal layoffs were an annual event because the work at Den Mar Inc., Rail Unlimited Inc (a subcontractor for GM) was effected by GM's seasonal closings for retooling each year. Employee's were routinely laid off and called back as work picked up. French emphasized the lay off was "permanent" based on a company directive, but never produced a copy of the directive even though Stingley requested a copy. The record shows that Stingley was the only Den Mar Inc. employee affected by that layoff.

Stingley established a prima facie case of wrongful termination in retaliation for complaining about a hostile work environment that existed as the result of her filing a complaint of sexual harassment based on sex, which is actionable under Title VII. To prove a prima facie case of retaliation the plaintiff must establish that (1) she participated in an activity protected by Title VII, (2) her employer took adverse action against her, (3) a causal connection exist between the protected activity and the adverse employment action. *Banks v E. Baton Rouge Parish Sch. Bd.*, 320 F. 3d 570, 575 (5th Cir. 2003)

The lower Court and Panel attempt to distinguish as separate and unrelated, Muldrow's sexual harassment, Stingley's initial complaint, hostile work environment, and Stingley's wrongful termination. Evidence in the record shows a progressive and persistent chain of events. The harassment created a hostile environment, which

ultimately influenced French's adverse employment action.

The pre textual layoff constitutes an adverse employment action in response to a covered action, and French laid Stingley off just 5 days after she left the note voicing her complaint objecting to continuing hostile conditions.

Determination of materially adverse action depends upon the circumstances of the particular case, and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances". *Burlington N. & Santa Fe Ry. v. White, 126 S. Ct. at 2417 (quoting Oncale, 523, U. S. at 81 (quoting Harris, 510 U. S. at 23).* The adverse employment action taken against Stingley by French "could well dissuade a reasonable [employee] from making or supporting a charge of discrimination. *Id. at 2409.*

Defendant's offered conflicting accounts of the reason for Stingley's layoff. (r at 213 par 3) Doak first states the reason for Plaintiffs layoff is "because "Rail Unlimited a sister company of Den mar Inc., was informed that it had lost a very profitable contract in San Antonio", yet in a sworn answer Doak provided in Plaintiff's first set of interrogatory questions, Doak states Den Mar Inc., and Rail Unlimited Inc. have no relation". Different reasons

can serve as evidence of pretext. *Dominguez-Cruz v Suttle Caribe, Inc.*, 202 F. 3d 424, 432. (1st Circuit 2000) "The consistency of the explanation provided by an employer at the time of an employment decision and in an administrative proceeding is evidence of the veracity of the employer's explanation at summary judgment."). The timing of an employer's changing rationale is also probative of pretext. See *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1311 (10th Cir. 2005)

It is also notable, that Stingley was the only person laid off as a result of the lay off that was alleged to have been caused by the loss of a significant contract. Den Mar Inc., Rail Unlimited Inc. were subcontracts who loaded new cars onto rail cars for shipping. The loss of a contract would have first effected the number of male loaders needed. That was the bread and butter of the operation. Suggesting that eliminating Petitioners $10.00 an hour clerk position was the budgetary solution to an alleged significant contract loss is not credible.

V. Panel's Abuse of Unpublished Opinion

The propriety and constitutional legality of unpublished opinions has long been questioned. The case load of courts is the most common rational offered for this ever increasing practice. The framers never intended that burdensome caseloads should ever justify impeding the constitutional rights of citizens. The First Amendment guarantees that

"Congress shall make no law abridging the rights of the people to petition the Government for redress of grievances." Perhaps the Judicial Conference of the United States in it's sanctioning of unpublished opinions, did not anticipate the potential for "legalized" injustices inherent in that policy, or the collateral consequence of due process loss of checks and balances.

Through the unpublished opinion in this instant case, The Panel has affirm a flawed lower court decision, exercised no diligence in reviewing that decision, with the assurance that the risk of review of that Panel decision, no matter how flawed is minimal at best. Inherent in this system, lives the capacity for countless litigants to be subjected to injustice at the hands of their justice system. Petitioner has been subjected to a judicial process that raises serious doubts about equal protection, due process, and disparate treatment of litigants by a system who's environment is ripe for the administration of injustice at will, with no accountability.

Either the Panel failed miserably to uphold it's duty to review Petitioner's case with diligence, or something more sinister is at play. Published decisions require that a judge lay out the facts and procedural background of a case in detail. Unpublished opinions offer a truncated explanation of facts and procedures associated with a case. The Panel in this unpublished opinion neglected to mention many significant facts in Petitioner's case. The alleged repeated groping, the series of

unsolicited after hours calls, Muldrow exposing himself, and the fact that Petitioner survived summary judgment prior to the Court's sua sponte action were all omitted from the opinion.

The use of an unpublished opinion is proper according to 5th Cir.R.47.5.1, if "the opinion will not in any way interest person other than the parties to [that particular case] because the opinion neither establishes a new rule of law, modifies an existing rule or law, applies an existing rule to distinct facts, nor concerns any issue of significant public interest" Petitioner's case contains several issues of significant public interest, including questions regarding the limits of a District Courts inherent power, and the publics eroded confidence in the Fifth Circuits handling of sexual harassment complaints. This opinions also raises questions about a process that can subject litigants to unjust decisions, and dispose of those decisions by unpublished opinion without due process checks and balances necessary to protect the public.

[1]

"Justice must not only be done, it must appear to be done. The authority of the federal judiciary rests upon the trust of the public and the bar. Courts that articulate no reasons for their decisions undermine that trust by creating the appearance of arbitrariness.

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[1] William L. Reynolds and William M. Richman, "An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform," 48 The University of Chicago Law Review, 573 (1981)

Surely the high Court recognizes that the recent incarceration of former Federal Judge Samuel Kent has done extensive damage to the confidence of women who are the victims of sexual harassment in the Fifth Circuit, to Petitioner, and to the public's confidence at large, primarily because of the Fifth Circuit Judicial Council's mild response to the very serious claims of sexual misconduct in the workplace that were leveled against a Fifth Circuit Judge.

It was not the due diligence of the Fifth Circuit Judicial Council that brought Judge Kent to justice, but rather public pressure, and an investigation by the U. S. Justice Department. Nothing about the handling of Petitioner's case should calm the fears of victims of sexual harassment in the Fifth Circuit.

While the public can rest easy because Judge Kent no long has the power and authority of the judiciary to harm others, the same cannot be said of those judges that were complicit in rendering a mild rebuke in the face of Judge Kent's serious sexual transgressions in the workplace. Those who are charged with the administration of justice for victims of sexual harassment in the workplace were willing to allow a former female Case Manager (McBroom), to be further victimized by a justice systems willingness to minimized serious sexual misconduct by a Federal judge. This very public failure by the Fifth Circuit would be

bad enough if it were an isolated failure, but Petitioner's very serious claim of sexual harassment has been subjected to the same judicial insensitivity and lack of due diligence by a Fifth Circuit Panel (some of whom were members of the Fifth Circuit Judicial Council during review of the complaint against Kent). This raises very serious questions about a systematic problem within the Fifth Circuit process of reviewing cases of sexual harassment in the workplace.

To whom does the public cry when the system appears to be broken, and who is left to protect the rights of women who, like Petitioner, have been severely violated in the work place s and seek justice through a fair hearing of the merits? It is unconscionable that any citizen would be further victimized by our nations judicial system after having suffered the abuse, degradation, and stress of sexual harassment in the workplace, and in Petitioner's case, the devastating loss of income associated with wrongful termination.

In a May 27, 2009 letter, Chief Judge Edith Jones almost apologetically advises Attorney Dick DeGuerin (Judge Kent's Attorney) that, "the intense public interest in the criminal case creates a "unique need" to advise the public of the reasons" for her decision to deny former Judge Kent's request to be certified disabled, (so that he would not lose his federal pension). Judge Jones acknowledges that intense public interest was her motivation for making that letter public. It is note worthy, that she does not state her

own interest in judicial transparency, but rather, public pressure was her motivation. Public interest was generated by public outrage with the Fifth Circuit Judicial Council's failure to take McBroom's allegations more seriously and punish more severely one of it's own.

An August 29, 2008 ABA Journal article stated, re guarding the Judge Kent ethics investigation, "the special investigating committee was headed by Chief Judge Edith Jones, who has shown "remarkable hostility" to sexual harassment complaints." This reputation, not to mention the conduct of Judge Jones has done much to erode public confidence in the handling of sexual harassment complaints by the Fifth Circuit.

The actions of the Fifth Circuit Judiciary raise legitimate public concerns about disparate treatment of women, and judicial insensitivity that minimizes claims of harassment by women. This public failure by the Fifth Circuit is prejudicial to litigants, making if difficult if not impossible for litigants to have confidence in many Fifth Circuit judges. There is also the appearance of the powerful and affluent being held to a different standard of justice.

Petitioner's complaint of sexual harassment was handled with the same lack of due diligence demonstrated with the McBroom complaint, and Petitioner has been subjected to a process replete with error and judicial abuses of power.

The Panels decision not to publish this opinion might have been deemed mere procedure were it not for the cumulative injustices contained therein. This unpublished opinion gives the Panel;s the ability to dispose of those injustices and presents clear and convincing evidence of an actual abuse of the use of an unpublished opinion. It crystallizes not only the potential for abuse in unpublished opinions, but evidences the existence of those abuses. It is not reasonable to believe that Petitioner's case is isolated. It is much more likely, particularly in the face of the Panels' brazen disregard for law and procedure, glaring errors, factual misrepresentations and omissions, that a culture exist where there is no fear of review of unjust unpublished opinions. Checks and balances are almost non existent, and litigants are at the mercy of a system that can be disparate and unjust at will, with little risk of review.

CONCLUSION

For all of the aforementioned reasons and in the interest of restoring public confidence in the Fifth Circuit, a writ of certiorari should be granted.

Respectfully submitted,

Dale Michele Stingley
Pro Se Petitioner
5613 Shady Hill Ln.
Arlington, TX 76016
817 495-2937

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 08-11060

DALE MICHELE STINGLEY
Plaintiff - Appellant

v

DEN MAR INC., RAIL UNLIMITED INC.
Defendants - Appellant

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

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ON PETITION FOR REHEARING EN BANC
(Opinion9/1/09, 5. Cir., _____, _____F.3d_____)

Before DAVIS, GARZA, AND PRADO Circuit Judges.

PER CURIUM:
(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is Denied. No member of the panel nor judge in regular actives service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. And 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing is DENIED. The court

having been polled at the request of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favour (FED. R. APP. P. And 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT;

s/ Edward C. Prado
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF MANDATE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-11060 Filed
September 1, 2009

DALE MICHELE STINGLEY

Plaintiff- Appellant

v

DEN- MAR INC, RAIL UNLIMTED INC

Defendant's- Appellees

Appeal from the United States District Court
For the Northern District of Texas
USDC No. 4:07-cv-673

Before DAVIS, GARZA, and PRADO, Circuit Judges
PER CURIAM

Plaintiff- Appellant Dale Michele Stinlgey, pro se, appeals the district court's order granting summary judgment to Defendants. Appellees Den-Mar, Inc. And Rail Unlimited, Inc. (collectively "Den-Mar") on her sexual harassment and retaliation claims under Title VII. For the following reasons, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 9, 2006, Stingley began working as a clerk

Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

at Den-Mar under the supervision of John Muldrow. One month later, Stingley reported to Den-Mar's human resources director, Kenneth doak, that Muldrow had been sexually harassing her. That afternoon (a Friday), Doake contacted Muldrow to advise him of the complaint. The following Tuesday, Muldrow stopped reporting to work. As of the second no-show day, he effectively resigned per company policy. Doake promptly notified Stingley of Muldrow's resignation, and she agreed with Doake that further action was unnecessary. Ron French became Stingley's new supervisor.

On December 30, 2006 Stingley sent Doake another letter to report disagreeable conduct by a coworker, Nina Tillmon. In the letter Stingley stated that she felt uncomfortable when Tillmon engaged in extensive phone calls with Muldrow at the office., allegedly discussing what happened to him. She further alleged that Tillmon- as a result of these calls, maliciously disparaged her to other co-workers , causing at least one other person to treat her less cordially and implied that Tillmon's actions were leading to an untenable work environment. Due to severe weather problems delaying mail delivery, Doak received the letter on January 18, 2007 and quickly asked French to investigate the matter. On January 25, 2007, French met with Tilllmon to dicuss his investigation. The next day, Tillmon abandoned her position and effectively resigned. There after Stingley reported no further acts of harassment or retaliation to Doak.

On March 7, 2007, French contacted Doak to suggest eliminating the clerk position, along with a

permanent layoff of Stingley, purportedly as part of a company-wide plan to cut cost after the loss of a lucrative contract. Doak agreed and scheduled Stingley's employment termination for March 17, 2007. On March 12, 2007, Stingley left French a note on his desk, in which she objected to his "rude and moody" treatment of her. This led French to contact Doake the next day and suggest the accelerating her termination. Doake responded that, despite the note, they would "stay with the plan." Den-Mar terminated Stingley's employment on March 17, 2007 as scheduled.

After submitting a complaint to EEOC and receiving a Dismissal and Notice of Right's, Stingley timely filed suit against Den-Mar asserting three Title VII claims, which she characterized as sexual harassment, hostile work environment and wrongful termination. Den-Mar later moved for summary judgment on Stingley's claims. The district court denied summary judgment on Stingley's sexual harassment claim but granted Den-Mar's motion for summary judgment on her remaining claims.

The district court later ordered Stingley to present evidence on a necessary (but unchallenged) element of the sexual harassment claim - that the alleged harassment affected a term or condition of her employment –to avoid a sua sponte grant of summary judgment for Den-Mar on that claim as well. Stingley filed a motion for reconsideration of the first summary judgment order and a response to the court's sua spnte order regarding her sexual harassment claim. The district court denied Stingley's motion for reconsideration, granted

judgment in favour of Den-Mar on Stingley's sexual harassment claim, and entered a final judgment dismissing all of her claims. Stingley timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. §1291.

We review the grant of summary judgment de novo, applying the same standard as the distirct court. *Strong v Univ. Healthcare Sys., L.L.C., 482 F.3d 802,805 (5th Cir. 2007).* A distrit court's grant of summary judgment is proper when " there is no genuine issue as to an material fact and... The movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also *Anderson v Liberty Lobby, Inc.* ,477 U.S. 242, 248 (1986) We may affirm summary judgment regardless of the district court's rulings, if the record contains an adequate and independant basis for that result. *Degan v Ford Motor co.,* 889, 892 (5th Cir. 1989)

III DISCUSSION

Because Stingley proceed's pro se, we construe her arguments liberally. See *Haines v Kerner,* 404 U.S. 519, 520 (1972) (per curiam). Broadly construing judgment on her sexual harassment claim sua sponte, (2) a genuine issue of material fact existed on her sexual harassment claim, (3) the district court erred in "merging" her retaliation and retaliatory discharge claims, and (4) the district court erred in granting summary judgment on her retaliation and retaliatory discharge claims on grounds different from those that Den Mar raised.

A. SEXUAL HARASSMENT

We first address the issues concerning Stingley's sexual harassment claim. To establish a prima facie case of sexual harassment by a super visor under Title VII, an employee must show: "(1) that [she] belongs to a protected class; (2) that [she} was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; and (4) that the harassment affected a term, condition, or privilege of employment." *Aryain v Wal-Mart Stores Tex. LP,* 534 f.3D 473, 479 (5th Cir. 2008) (quotation marks omitted). The district court notified Stingley of its intention to sua sponte grant summary judgment on Stingley's sexual harassment claim. After considering her response, the court held that Stingley had failed to establish a genuine issue of material fact as to whether the alleged harassment affected a term or condition of her employment. We agree.

Stingley first argues that the district court erred in acting sua sponte to grant Den-Mar summary judgment on her sexual harassment claim. It is well settled that a district court can grant summary judgment sua sponte so long as the adverse party had adequated notice to come forward with all of it's evidence. See *Celotex Corp. V Catrett,* 477 U. S. 317, 326 (1986); see also *Love v Nat'l Med. Enters.,* 230 f. 3d 765, 770-71 (5th Cir. 2000). A court provided a party with adequate notice by adhering to the same time frame prescribed for a party's motion for summary judgment, which is at least ten days before the day set for the hearing. See *Love, 230 F.3d at 770; see also Fed .R. Civ. P. 56 (c).* Here, the district court notified Stingley-- inan order dated September

12, 2008, on whether it should make a sua sponte ruling. Because the court provided Stingley ten business days (within which she in fact filed a response) and implicit instructions to present sufficient evidence, we find she had adequate notice. Therefore, the district court did not err in acting sua sponte to grant summary judgment on Stingley's sexual harassment claim.

Stingley also argues that she presented genuine issues of material fact that warranted the denial of summary judgment on her sexual harassment claim. Upon receiving the district court's notice of potential sua sponte ruling, which pointed out a lack of evidence that the alleged harassment affected a term or condition of Stingley's employment, Stingley bore the burden of going beyond her pleadings and presenting sufficient evidence to the contrary. See *Celotex, 477 U.S. at* 325. To do so, she had to preset evidence establishing that the alleged harassment was sufficiently severe or pervasive so as to alter her working condition s or create an abusive working environment. *Aryain,* 534 F. 3d at 479.

This Stingley failed to do, as most of the materials she presented did not constitute competent summary judgment evidence. Fedral Rule of Civil Procedure 56 sets out the standards for summary judgment and generally requires that evidence be sworn, certified, or verified material for a court to consider it. *See* FED. R. CIV. P 56(c) , (e); see also *King v Dogan,* 31 F. 3d 344, 346 (5th Cir. 1994). Here, the competent summary judgment evidence consists of Doake's

affidavit submitted in support of Den-Mar's motion for summary judgment, she had neither her exhibits nor her response properly sworn or certified as required. Stingley's complaint and other pleadings were similarly unverified. Thus neither the factual allegations in Stingley's complaint or response, nor ay of the facts in the unauthenticated documents attached and referred to in her affidavit, are competent summary judgment evidence.

Further, none of the competent summary judgment evidence sets forth any facts substantiating Stingley's allegations of sexual harassment. As Stingley admit's she wrote her affidavit to dispute the factual assertions in Doake's affidavit. But none of the facts Stingley disputes help her meet the burden of proving that the alleged harassment affected a term or condition of her employment. For example, Stingley disputes that her initial call to Doake occurred on November 10 instead of November 11, that Doake incorrectly recounted what he told Muldrow, and that Doake actually investigated her claim. None of these facts tend to show severe or pervasive harassment by Muldrow, rather, they reflect disputes as to whether Den-Mar promptly and adequately addressed her complaint. The competent evidence, viewed in the light most favourable to Stingley, establishes that she reported acts of sexual harassment by Muldrow to Doake, that Doake took action in response, and that Muldrow resigned several days later. Beyond these basic facts, we will not presume as true any of Stingley's allegations and assertions because she did not present sworn statements as to Muldrow's acts of sexual harassment. We conclude that Stingley did

present a genuine issue of material fact that would warrant a denial of summary judgment on her sexual harassment claim. We therefore affirm the district court's decision on this claim.

B. Retaliation and Retaliatory Discharge Claim

Stingley also appeals the district court's decision of her retaliation and retaliatory discharge claims. To establish a prima facie case of retaliation under Title VII, an employee must show: "(1) that she engaged in a protected activity; (2) that an adverse employment action occured; and (3) that a causal link existed between the protected activity and the adverse action." *Baker v Am. Airlines, Inc.* , 430 F. 3d 750, 754 (5th Cir.. 2005) (quotation marks omitted, numbering added). Stingley asserts that the district court erred in "merging her claims and in granting summary judgment on grounds other than those raised by Den-Mar. We need not address these issues, however, because we find that the record contains an

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Stingley contends on appeal that Den-Mar mischaracterized her hostile work environment claim as a retaliation claim. But neither Stingley's complaint nor her response to Den-Mar's motion for summary judgment alleged that Tillmon's hostile treatment individually or in concert with Muldrow was bases on her gender or any other characteristic protected under Title VII. Rather, Stingley alleged that Tillmon mistreated her because of the sexual harassment complaint against Muldrow. Stingley's further allegations in her response regarding French's conduct similarly sound of retaliation. Therefore, liberally construing Stingley's pro se brief, we construe her second and third claims fo retaliation.

adequate and in dependant basis to grant summary judgment when assessing these claims on the grounds that Den-Mar did raise.

As to Stingley's retaliation claim, she contends that Tillmon and French perpetuated a hostile work environment in retaliation for Muldrow's termination due to Stingley's sexual harassment complaint. In it's motion for summary judgment, Den-Mar asserted that Stingley could not prove Tillmon's alleged retaliatory conduct amounted to an adverse employment action. We agree.

An adverse employment act is one that "a reasonable employee would have found ...[to be] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co v White* U. S.53, 68 (2006) (quotation marks omitted). As with Stingley 's sexual harassment claim, the record contains no competent evidence to substantiate Stingley's allegation that she was subjected to an adverse employment action. Stingley offered two pieces of evidence; (1) a letter she sent to Doake, reporting her belief that Tillmon maliciously talked about her and caused others to treat her less cordially, and (2) the note Stingley left on French's desk, protesting his rude and disrespectful treatment of her. But Stingley's letter to Doake does nothing to substantiate her alleged harassment, as it is only evidence that she sent a letter and not that the events described in the letter actually occurred. And Stingley's note to

French, in addition to being unverified, fails to recount any specific facts regarding French's behaviour. In short, we find the record insufficient to raise a genuine issue of fact as to whether Stingley suffered a materially adverse employment action for this claim. Given that Den-Mar's motion for summary judgment provided Stingley proper notice to present sufficient evidence to prove an adverse employment action, we affirm the district court's grant of summary judgment on Stingley's retaliation claim.

Finally, as to Stingley's retaliatory discharge claim, she asserts that she was terminated in retaliation for engaging in Title VII-protected activity. In it's motion for summary judgment, Den-Mar argued that Stingley could not prove a causal link between the protected activity of her filing a sexual harassment complaint and her employment termination. We agree.

When a plaintiff presents no direct evidence of retaliation, she bears the initial burden of establishing a causal link "through circumstantial evidence of a retaliatory motive." *Favela v Socorro Indep. Sch. Dist.*, 329 F.3d 409, 415 n.6 (5th cir. 2003) If the plaintiff succeeds in offering circumstantial evidence in support of each element of her claim, she creates a ... Presumption of retaliation, and the burden shifts to the employer to demonstrate a legitimate reason for the adverse employment action" *Id.* "If the employer evidence of a legitimate reason for the adverse employment action" *Id.* "If the employer produces evidence of a legitimate reason for the action, the burden shifts again to the plaintiff to

rebut the employer's non-retaliatory rationale". *Id.*

Even assuming that Stingley satisfied her initial burden, she has not shown that Den'Mar's legitimate, non-retaliatory reason for terminating her employment —to reduce it's workforce after losing a lucrative contract— was pretext for an actual retaliatory reason. The only fact Stingley specifically disputes as to pretext is an inconsistency in the reason Doake provided for her discharge. In his affidavit, Doake asserted that Den-Mar lost the lucrative contract, but in his position statement to the EEOC, he asserted that Rail Unlimited — the sister company named as co-defendant lost the lucrative contract. We find this discrepancy, without more, insufficient to cast doubt on the legitimacy of Den-Mar's business reason for terminating Stingley's employment. The same goes for temporal proximity between any protected activity and Stingley's termination; although temporal proximity can establish a prima facia casa of retaliation, it cannot–standing alone–rebut an employer's legitimate, nondiscriminatory reason for the employment action. See *Strong,* 482 F. 3d at 808.

IV Conclusion

Although Stingley appears to ultimately and unknowingly lose on a procedural misstep related to the presentation of her evidence rather than on the potential merits of her claims, a district court has no obligation to provide a pro se litigant with particularized instructions on the requirements and consequences of summary judgment. See Martin v Harrison County Jail, 975 F. 2d 192, 193 (5th Cir. 1992). The published rules of procedure afford pro se

Litigants sufficient notice of what step to take in a summary judgment proceeding, see id., and the decision of whether to give parties the opportunity to remedy material presented for summary judgment is within the discretion of the district court, see Gordon V Watson, 622 F. 2d 120, 123 (5th Cir. 1980) (per curiam)

Accordingly, we conclude that the competent summary judgment evidence presents neither disputed material facts nor a basis upon which a reasonable jury could return a verdict for Stingley. The absence of evidence to support Stingley's claims entitles Den-Mar to summary judgment. We therefore AFFIRM the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FT WORTH DIVISION

FILED
FEB 8 2008
CLERK US DISTRICT
COURT

DALE MICHELE STINGLEY

PLAINTIFF,

NO. 4:07-cv-673-A

vs.

DEN MAR ., ET AL.,

DEFENDANTS

ORDER

Having considered the motion of plaintiff, Dale Michele Stingley, for sanction against counsel for defendant's, Den-Mar Inc. And Rail Unlimited, Inc., the court concludes that such motion should be denied. Therefore,

The court ORDERS that plaintiff's motion be, and is hereby denied.

Signed February 8, 2008
s/ John McBryde
United States Distric Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DALE MICHELE STINGLEY,

Plaintiff

FILED
SEP 10, 2008

VS,

DEN-MAR, INC., ET AL.,

Defendants,

ORDER

Came on for consideration the motion to compel filed by plaintiff Dale Michele Stingley. The court, after having reviewed the motion, the response of defendants, Den-Mar, Inc., and Rail Unlimited Inc., the record, and applicable authorities, concludes that the motion should be denied.

Plaintiff in her motion seeks to compel defendants (1) to answer interrogatory number 15, because she does not believe defendant's response, and (2) to respond to such requests were insufficient. In interrogatory 15 plaintiff seeks "copies of all emails, and letters with names and contact numbers of all parties related to conversations and communications that led up to the alleged directive to ramps" that resulted in plaintiff's termination. Pl's Mot. at 5;

Pl..'S Ex. 1 at 5-6. This interrogatory is based on an alleged statement by Plaintiff's supervisor that effected [sic] other ramps also." "None." Pl.'S Ex. 1 at 6. Plaintiff's motion as to this interrogatory is grounded on her belief that it is unreasonable that managers involved in the alledged reduction in force did not receive written directives. However, plaintiff does not allege that French or anyone else in the company told her the action was taken as a result of a written directive. In their response to plaintiff's motion, defendants provided the affidavit of Kenneth Doake, their human resources manager, who affirmed that no such written documents were created or exist. See Def's resp. Ex. B. As plaintiff has adduced nothing but her subjective belief that such documents should exist, her motion is denied as to interrogatory 15.

Plalintiff also seeks to compel defendants to produce "itemized phone records of company cell phone" used by her former supervisor, James Muldrow. Pl.'S Mot. At 7. Defendandts responded that they did not have, and have never possessed, such records, as they only receive summarized (rather than itemized) phone records for employee cell phones. Based on the defendant's explanation, it appears that the documents plaintiff seeks may not be within defendant's possession, custody, or control, as contemplated by Rule 34 (a) of the Federal Rules of Civil Procedure, and plaintiff has not shown otherwise. The court concludes that plaintiff's motion to compel with respect to request for production number 1 should be denied.

Finally, plaintiff sought production of

> [a]ny and all itemized financial and business Bank account statements for Den-mar Inc's corporate Oklahoma office and Arlington, TX office office, for calendar years of 2006-2007. Statements should reflect payroll bank accounts, and any financial statements that provide documentation for how operating and business expenses for the Arlington Den-Mar Inc. Office were paid during that time.

Pl.'s Mot. At 8; Pl.'S Ex. 1 at 7. Plaintiff contends that the information is relevant because she alleged that defendant's comprise a single employer, and thus a review of their bank account and financial records is necessary to establish Rail Unlimited's involvement in Den-Mar's payroll and business operation. Factors the Fifth Circuit considers " to determine if distinct entities constitute an integrated enterprise are (1) interreation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control" Vance v. Union Planters Corp., 279 F. 3d 295, 297 (5th Cir. 2002) Further, most courts have focused on the second factor. See id. Plaintiff does not explain how, or if, she has attempted to obtain other information relevant to her single employer theory before moving to compel production of defendants' financial information. Further, exhibit 4 of plaintiff's motion contains copies of several payroll statements, many of which list Rail Unlimited, Inc., as the payor. Plaintiff therefore already has in her possession evidence that Rail Unlimed participated in Den-Mar's payroll functions.

Therefore,

The court ORDERS that plaintiff's motion to compel be, and is hereby, denied.

SIGNED Sept 10, 2008

s/ John McBryde
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FT WORTH DIVISION

DALE MICHELE STINGLEY

Plaintiff,

Filed
Sep 10, 2008

VS

DEN-MAR. INC., ET AL.,
Defendants

MEMORANDUM OPINION
AND
ORDER

Came on for consideration the motion for summary judgment filed by defendants, Den-Mar, Inc. ("DenMar"), and Rail Unlimited Inc. ("Rail Unlimited") (collectively, "defendants"), as to all claims filed against them by plaintiff, Dale Michele Stingley. Plaintiff timely filed her response to the motion. Having considered the motion, the response, the summary judgment record, and applicable authorities, the court has determined that the motion should be granted in part and denied in part.

I.
Plaintiff's Claims

Plaintiff alleges that during her employment she was sexually harassed by her supervisor, and that defendant's wrongfully terminated her in retaliation

for opposing a hostile work environment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII").

II.

The Motion for Summary Judgment

Defendants maintain that plaintiff cannot establish a prima facie case of either sexual harassment or retaliation. Defendant's further contend that plaintiff was discharged as part of a reduction in force and that she cannot prove that this reason is pretext for retaliation.

III

Undisputed Facts

The following facts are undisputed in the summary record:

Plaintiff began her employment with Den-mar on October 9, 2006, as a clerk at it's facility located in Arlington, Texas. Rail Unlimited, though not plaintiff's direct employer , is a sister company to Den-Mar. Kenneth Doake ("Doake") served as

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Section III. B. of defendant's motion addresses a purported retaliation claim by plaintiff regarding the actions of a coworker, Nina Tillmon. However, in her response, plaintiff denies any intent to bring a claim against Tillmon and confirms that her only complaint of retaliation concerns the alleged acts of defendants. Pl's Resp. At 16. Therefore the court need not address defendants' arguments regarding Tillmon.

human resources director for defendant's at all times relevant to this action.

On November 10, 2006, plaintiff contacted Doake and reported that she had been sexually harassed by her supervisor, John Muldrow ("Muldrow"). After discussing plaintiff's complaint, Doake confirmed his conversation with plaintiff in a letter that same day. In the letter Doake requested additional, specific information from plaintiff regarding her allegations against Muldrow, and also expressly advised her to contact him immediately if she experienced any retaliation resulting from her complaint. Doake then contacted Muldrow to inform him of plaintiff's complaint and advise that he was beginning an investigation into her allegations.

On November 14 and 15, 2006, Muldrow failed to report to work; consequently, defendants considered Muldrow to have resigned his position per company policy. On November 17, 2006, Doake notified plaintiff via letter of Muldrow's resignation and stated his belief that the same should resolve plaintiff's complaint. In a November 27, 2006, letter to Doake, Plaintiff confirmed that Muldrow's resignation made further action by defendants unnecessary. After Muldrow's resignation, Ron French ("French") became plaintiff's new supervisor.

On January 18, 2007 Doake received another letter from plaintiff, dated December 30, 2006, complaining of actions toward her by a coworker, Nina Tillmon ("Tillmon"). Doake again responded to plaintiff with a letter informing her that he would have French and Charles Hickman, the new assistant manager, investigate her allegations, The following day, French

informed Doake that he and Hickman planned to meet with plaintiff that day to discuss her complaints. A few days later on January 25, 2007 French met with Tillmon to discuss his findings and conclusions. However, before defendants could take any action against her, the next day Tillmon abruptly left work without notice and abandoned her position. Plaintiff raised no further complaints of harassment or retaliation with Daoke.

On March 12, 2007, plaintiff became upset over an incident between herself and French and left the following note on his desk:

" At no time is it necessary to be rude to me or to speak to me like I am a child. I spoke to you when you first took over as manager about coming across rudely when dealing with me. I will always find that treatment unacceptable.

There are days when it seems I have to take your temperature to know what your mood is and at times that puts me off balance. To my knowledge there are no issues with my job performance and if it is personal that is unfortunate because I enjoy the work I do. If there is a problem that I should be aware of please let me know. As long as I am employed here I ask is [sic] to be treated with respect and be told if there is a problem with anything I do. "

Respectfully,
Michele Stingley

Pl.'s App. Ex. 9. On march 17, 2007, defendants terminated plaintiff's employment.

IV.

Applicable Summary Judgment Principals

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, inc. , 477 U. S. at 242,247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. Anderson, 477 U. S. at 256. The movant may discharge this burden by pointing out the absence of of evidence to support one or more essential elements of the non-moving party's claim "since a complete failure of proof concerning an essential eleent of nonmoving party's case necessarily renders all other facts immaterial. Celotex Corp. v Catrett, 477 U.S. 317, 323-325 (1986). Once the moving party has carried it's burden under Rule 56(c) the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts: Matsushita Elec. Indus. Co., Ltd.v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. Anderson, 477 U.S. At 248, 256. To meet this burden, the nonmovant must "identify specific evidence in the record and articulate the "precise manner" in which that evidence suport[s] [it's] claim [s]." Forsyth v. Barr, 19 F.3d 1527, 1537 (5th Cir. 1994). An issue is material only if its resolution could affect the outcome of the action. Anderson, 477 U.S. at 248.

Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. Simmons v.Lyons, 746 F. 2d 265, 269 (5th Cir. 1984)

The standard for granting a motion for summary judgment is the same as the standard for rendering judgment as a matter of law. Celotex Corp., 477 U. S. at 323. If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Matsushita, 475 U.S. At 597. See also Boeing Co. v Shipman, 411 F. 2d 365, 374-75 (5th Cir. 1969) (en banc) (explaining the standard to be applied in determining whether the court should enter judgment on motions for directed verdict or for judgment notwithstanding the verdict).

Analysis

A. Plaintiff's Sexual Harassment Claim.

To prevail on a claim of sexual harassment by a supervison, a plaintiff must establish that; (1) she belongs to a protected class; (2) she was subjected to unwelcome sexual harassemnt; (30 the harassment was base on sex; and (4) the harassment affected a term, condition, or privilege of employment . See Lauderdale v. Texas Dept. Of Criminal Justice, Inst. Div., 512 F. 3d 157, 162-63 (5th cir. 2007). Defendants list a fifth element, that "the employer knew or should have known of the harssment and failed to take Woods v. Delta Bev. Group, Inc., 274 F. 3d 295, 298 (5th Cir. 2001). Defendants rely on this fifth element in their motion, claiming plaintiff cannot establish they failed to take prompt remedial action. However, as explained in Woods, the Fifth Circuit distinguishes

between cases

> "in which an employee asserts a Title VII sexual harassment claim alleging that a supervisor with immediate (or successively higher) authority harassed her and cases in which the harasser is a co-worker. In the former situation, the employee need only satisfy the first four elements of the aforementioned test. In the l atter situation, we made clear that the employee must satisfy all five elements."

274 F. 3d at 278 n.2 (internal citations omitted). It is undisputed that plaintiff's alleged harasser was her immediate supervisor; Thus, plaintiff is not required to establish the fifth element. As defendants have offered no other grounds for summary judgment on plaintiff's sexual harassment claim, the court will deny summary judgment as to that claim. See John Deere Co. v. American Nat'l Bank, Stafford, 809 F.2d 1190, 1192 (5th cir. 1987)

B. Plantiff's Retaliation Claim.

Establishing a prima facie case of retaliation under Title VII requires a showing that the plaintiff: (1) engaged in a protected activity; (2) was subject to an adverse employment action; and (3) can demonstrate a causal link between the protected activity and the adverse action. See Baker v. American Airlines, Inc., 430 F. 3d 750, 754 (5th Cir. 2005). If the employee establishes a prima facie case, the burden shifts to the employer to state a legitimate, non-retaliatory reason for its action. See id. After the employer provides a

reason, "any presumption of retaliation drops from the case" and the employee must must prove that the stated reason is merely a pretext for unlawful retaliation. *Id. At 755*

In their motion defendants argue that plaintiff's retaliation claim fails because she cannot establish any causal link between the filing of her sexual harassment complaint and her termination, and because she has offered no evidence that defendants' reason for her discharge - a reduction in force - was a pretext for retaliation.

In her response, plaintiff clarifies that her retaliatory discharge claim "was based on Plaintiffs [sic] protesting of the ongoing hostile treatment of Ram Mgr.Ron French, "rather than her sexual harassment complaint. Pl's Resp. At 18. Plaintiff claims her protected activity was the note she left on French's desk on Marcy 12, 2007, complaining that he had been "hostile" towards her after becoming the manager. Id. Plaintiff claims the note – the protected activity" - establishes the causal link because her termination occurred mere days after she left it on

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Plaintiff's response states that she was discharged because she protested "being subjected to a hostile work environment related two complaints of sexual harassment." Pl.'S Resp. At 18. The response however, makes clear that plaintiff does ot repate her discharge to her sexual harassment complaint, but only to her protest of French's allegedly hostile behaviour towards her. See id. At 18-20, 23. To the extent plaintiff alleges Tillmon's actions created a hostile work environment, defendant's acted promptly to end the harassment. See Woods v. Delta Bev. Group, Inc. 274 F.3d 295, 298 (5th Cir. 2001)

French's desk. Id. At 20, 23. The text of the note is set forth in it's entirety supra, at 4.

The court finds that plaintiff has failed to establish a prima facie case of retaliation because she did not engage in protected activity contemplated by Title VII. Under Title VII an employee engages in protected activity if she has "opposed any practice made an unlawful employment practice by this subchapter, " or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U. S. C. § 2000e-3 (a). Nothing in plaintiff's note to French opped or protested any unlawful employment practice under Title VII, nor does the note even refer to her previous complaint of sexual harassment. Rather, the note simply complains of French's alleged rudeness and moodiness; nothing in the note states or even implies that those behaviours are due to plaintiff's race, gender, or anything else protected by Title VII. Rather, plaintiff's complaints about French are no

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Notably, plaintiff does not contend that her previous complaint of sexual harassment was the protected activity on which her retaliation claim is grounded. Even if plaintiff made this argument, her prima facie case still fails: plaintiff made her sexual harassment complaint in November 2006 and was discharged March 2007. The four month lapse, without more, is un sufficient to establish the causal connection necessary for a prima facie case of retaliation. See, e.q., Strong v. University Healthcare Sys. , L.L.C., 482 f.3d 802, 808 (5th cir. 2007) (temporal proximity aloneis insufficient" to prove retaliation, holding that three and a half months between protected activity and termination insufficient to establish retaliation.

more than the "petty slights, minor annoyance, and simple lack of good manners" that are not actionable retaliatory conduct. See Aryain v. Wal-Mart Stores Tex. LP, 534 F. 3d 473, 484-85 (5th Cir. 2008) (citing Burlington N. & Santa Fe Ry. Co. v White, 548 U. S. 53, 68, (2006) Therefore , the note cannot constitute the protected activity required to support a claim of retaliation. See Turner v.Baylor Richardson Med. Ctr., 476 F. 3d 337, 348-49 (5th Cir. 2007) (email and statements to supervisor that failed to mention unlawful employment practice not protected activity); Harris-Childs v. Medco Health Solutions, Inc., 169 f. App"x 913, 916 (5th cir. 2006) (complaint to employer of general harassment not protected activity); Evans v. Texas Dept. of Trans., 547 f. Supp. 2d 626, 654-55 (E. D. Tex. 2007) (complaint of hostile work environment based on rude behavior of supervisor, with no mention of Title VII-protected characteristic, not protected activity)

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In addition to the rude conduct described in the note, plaintiff alleges that the following conduct of French created a hostile work environment; he was "sneaky," he took exception to plaintiff's complaints against Muldrow, plaintiff had to "walk [] on eggshells," he repsonded to her in a "rude" agressive tone,", he snatched notes or messages from her hand, he responded in a loud and rude voice to her phone call to him, and after she left the note, he had a "piercing, glaring look" in his eyes. Pl's Resp. At 18-9.

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Although the court does not reach defendants' other summary judgment ground, namely, that plaintiff has failed to establish that he reason for her discharge is a pretext for retaliation, a preliminary review indicates that defendants would be entitled to summary judgment on that basis as well.

VI.

Order

For the reasons discussed above, the court concludes that defendants' motion for summary judgment should be denied in part and granted in part. Therefore,

The court ORDERS that defendants' motion for summary judgment on plaintiff's claim of sexual harassment be , and is herby denied.

The court further ORDERS that plaintiff's claim of retaliation, be , and is hereby dismissed.

SIGNED Sept 3, 2008

s/ John McBryde
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DALE MICHELE STINGLEY

Plaintiff,

vs.

DEN-MAR, INC., ET AL.,

FILED
SEPT 11, 2008

No. 4:07-CV-673 A

ORDER

The court's attention has been called to an error on page 12 of the memorandum opinion and order filed September 10, 2008, in the above-captioned case. Attached to this order as an exhibit is a corrected page 12 on which the date the memorandum opinion and order was signed has been changed from "September 3, 2008." The parties are to substitute this page in the copy of the memorandum opinion and order which previously indicated it was signed on September 3, 2008; and, the clerk is to substitute the original of this corrected page in the original of such memorandum opinion and order filed September 10, 2008.

THE COURT SO ORDERS

SIGNED September 11, 2008

s/ Judge John McBryde
United State District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DALE MICHELE STINGLEY

FILED

Plaintiff,

SEP 12 2008

VS.

DEN-MAR INC. ET AL.,

Defendants.

ORDER

On September 10, 2008, the court granted defendants' motion for summary judgment as to plaintiff's claim of retaliation, denied the motion as to her claim of sexual harassment. After a review of the complaint and the papers on file in this action, the court sua sponte to grant summary judgment for defendants dismissing plaintiff's sexual harassment claim, and this action in its entirety, on the grounds that the summary judgment record establishes as a matter of law that the alleged harassment did not affect a term or condition of her employment, and that plaintiff is unable to fulfill her burden to present evidence that the alleged harassment affected a term or condition of her employment. Prior to making such a decision, the court will afford plaintiff an opportunity to respond to the court's intentions.

The court ORDERS that by September 26, 2008, plaintiff file whatever she wishes to file on the subject of whether the court should make such a sua sponte ruling.

SIGNED September 12, 2008

s/ John McBryde
United States District Judge

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1 Plaintiff should bear in mind that the court has already determined that the termination of her employment in March 2007 was unrelated to her claim of sexual harassment filed in November 2006.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FILED

DALE MICHELE STINGLEY,

OCT 3, 2008

Plaintiff,

VS. No. 4:07-CV-673-A

DEN-MAR, INC., ET AL.,

Defendants,

ORDER

On September 12, 2008, the court informed plaintiff, Michele Stingley , that it was inclined sua sponte to grant summary judgment for defendants, Den-Mar, Inc., and Rail Unlimited Inc., dismissing plaintiff's sexual harassment claim on the grounds that the summary judgment record establishes as a matter of law that the alleged harassment did not affect a term or condition of her employment, and that plaintiff is unable to fullfill her burden to present evidence that the alleged harassment affected a term or condition of her employment. Prior to making that decision, the court ordered plaintiff to file by September 26, 2008, whatever she wished to file on the subject of whether the court should make such a sua sponte ruling.

On September 26, plaintiff filed her amended notice of objection in response to the court's order, in

which she generally reiterate her grounds for objecting to defendants motion for summary judgment, and submitted five exhibits, three of which were previously provided in plaintiff's appendix filed in support of her response to the summary judgment motion .

After review of plaintiff's notice of objection, applicable legal authorities, and the papers on file in this action, the court concludes that plaintiff has not submitted competent summary judgment evidence that the alleged harassment affected a term or condition of her employment. In Exhibit 22 of her summary judgment appendix, plaintiff submitted a single affidavit in which she responded to the statements in the affidavit of Kenneth Doake, defendants' human resources manager. Nowhere in the affidavit does plaintiff set forth her allegations of sexual harassment. Other than this single affidavit , plaintiff's remaining submissions in response to defendant's motion for summary judgment and in response to the court's September 12 order have consisted of various unverified documents. These

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1 Exhibit number two is portion of plaintiff's unverified response to defendant's motion for summary judgment; exhibit number five is a single page from the court's September 10, 2008 order granting partial summary judgment to defendants.

8 Even if plaintiff had presented an affidavit or declaration in support of her allegations against defendant's, the court has serious misgivings as to whether the alleged facts would raise an issue that the harassment of which plaintiff complains affected a term, condition or privilege of employment. See Hockman v. Westward Comm., LLC, 407 f.3d 317 (5th cir,2004)

submissions are insufficient to sustain plaintiff's summary judgment burden.

Therefore,

The court ORDERS that plaintiff's claim of sexual harassment against defendants, Den-Mar Inc., and Rail Unlimited Inc., be and is hereby, dismissed.

SIGNED October 3, 2008.

s/ John McBryde
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FILED

DALE MICHELE STINGLEY

OCT 3, 2008

Plaintiff,

vs.

No. 4:07-CV-673-A

DEN-MAR, INC., ET AL.,
Defendants

FINAL JUDGMENT

Consistent with the order signed by the court in the above captioned action on this same day,

The court ORDERS, ADJUDGES AND DECREES that all claims and causes of action asserted by plaintiff, Dale Michele Stingley against defendants, Den-Mar Inc., and Rail Unlimited Inc. Be and are hereby , dismissed.

The court further ORDERS, ADJUDGES, and DECREES that defendants have and recover their cost from plaintiff.

SIGNED October 3, 2008.

s/ John McBryde
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DALE MICHELE STINGLEY

Plaintiff,

NO. 4:07-CV-673-A

VS.

DEN-MAR, INC., ET AL.,

Defendants.

ORDER

Came on for consideration the motion to amend final judgment by plaintiff Dale Michele Stingley. Having considered the motion, the court concludes that is should be denied. Therefore,

The court ORDERS that plaintiff's motion to amend final judgment be, and is hereby denied.

SIGNED October 15, 2008

s/ John McBryde
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Filed
U. S. District
Court
Northern Dist. Of TX
2008 July 16 AM 11:21
Ft Worth Division

DALE MICHELE STINGLEY

Plaintiff,

v

Jury Trial Demanded
Civil No. 4:07-CV-673-A

Den Mar Inc.
Rail Unlimited Inc.

PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Comes now Pro se Plaintiff Dale Michele Stingley respectfully to request this Honorable Court to grant leave, thereby permitting Plaintiff to file a Second Amended Complaint and states a follows:

I.

BACKGROUND

Plaintiff filed original complaint in this Court November 7, 2007. On December 5, 2007 Plaintiff was ordered by this Honorable Court to Amend the Original Complaint in this action to allege with specificity, as to each defendant separately, the facts which support the claims alleged against that defendant. Plaintiff files a Motion for Leave to file a Second Amended Complaint to more completely set forth claims and the relief sought in this action, and to address any possible deficiencies or defects.

II

Rule 15 of the Federal Rules of Civil Procedure provides in relevant part as follows:

[A] part may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Federal Courts have liberally allowed amendments of pleadings under Rule 15 so as to assist in the disposition of litigation on the merits. The liberality of the rule has been repeatedly noted resulting in appellate court reversal of those cases in which the trial court failed to effectuate the policy of the rule. See, e.g., *Forman v. Davis* 317 U.S. 178 (1962)

III

The proposed amendment to the complaint will not cause undue prejudice, is not introduced in bad faith or with dilatory motive and the amendment would not be futile. In general, the Federal Rules of Civil Procedure require leave to amend be freely granted.

Therefore Plaintiff respectfully request that this court grant leave to file a second amended complaint.

Respectfully submitted,

s/ Pro Se Plaintiff Dale Michele Stingley
5613 shady Hill Ln
Arlington, TX 76016
817 654-2520

Defendants Den Mar Inc. And Rail Unlimited Inc.s Failure to prevent sexual harassment, failure to prevent a hostile work environment (after being notified of the sexual harassment problem), and failure to prevent retaliation. Plaintiff was subjected to a hostile work environment right up to the time of her wrongful termination. The wrongful termination was an act of retaliation because of Plaintiff's protesting a hostile work environment related to her sexual harassment complaint.

As a result of defendants unlawful conduct, Plaintiff has suffered damages in the form of lost wages, lost future wages, emotional pain, personal embarrassment, mental anguish, humiliation, inconvenience, loss of enjoyment, mental anguish, humiliation, inconvenience, loss of enjoyment of life and other losses.

Wherefore, Plaintiff prays for judgment against Defendants as follows: Litigation expenses and cost of suit, back pay with interest, compensatory damages for non economic damages suffered by Plaintiff, (emotional distress, personal embarrassment, humiliation, loss of enjoyment of life, mental anguish) in the amount of $200,000 against each defendant, and punitive damages in an amount to be determined at trial, for such other further relief as the court may deem just and proper.

Respectfully submitted,
s/ Dale Michele Stingley Pro se Plaintiff
5613 Shady Hill Lane
Arlington TX 76016

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EXHIBIT

DALE MICHELE STINGLEY

Jury Trial Demanded

Plaintiff,

Civil No. 4:07-CV-673-A

V

Defendant

Den Mar Inc.
Rail Unlimited Inc.

SECOND AMENDED COMPLAINT

Plaintiff Dale Michele Stingley, Social Security No. 587-08-2712, who is 49 years of age and resides at 5613 Shady Hill Lane, Arlington TX 76016. Defendants, Den-Mar Inc. 210 S. E. 89th Street, Oklahoma City, OK 73149, Rail Unlimited Inc. 210 S. E. 89th Street, Oklahoma City, OK 73149.

This action is brought by Dale Michele Stingley, Pro se Plaintiff, pursuant to the following jurisdiction: Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination on the basis of race, color, sex (gender, pregnancy and sexual harassment), religion or national origin and its anti retaliation provision which prohibits discrimination against an employee who has made a charge, testified,

anticipated in a title VII proceeding or investigation.

Plaintiff was employed by defendant Den-Mar Inc., and worked at the Den-Mar Inc., facility, located at 3017 E. Abrams, Arlington, TX 76010 with it's (Den-Mar Inc.'S) corporate office located at 210 S. E. 89th ST., Oklahoma City OK 73149. Plaintiff also names Rail Unlimited Inc., 210 S. E. 89th Street, Oklahoma City, OK 73146 as a defendant under the single employer theory. This action is taken pursuant to Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination on the basis of race, color, sex, gender and sexual harassment, and it's anti retaliation provision which forbids discrimination against an employee who has made a charge, testified, assisted, or participated in Title VII proceeding or investigation.

While employed at the Den-Mar facility at 3017 E. Abrams, Arlington, TX 76010, Plaintiff was subjected to sexual harassment including but not limited to unwelcomed sexual advances by her supervisor verbal and physical (groping). Plaintiff was also subjected to a hostile working environment including but not limited to being threatened with bodily harm by a co-worker, directly related to her reporting incidents of sexual harassment and a direct consequence of defendants failure to prevent a hostile work environment after notice of a sexual harassment problem. Plaintiff was ultimately wrongfully terminated in retaliation for opposing a hostile work environment related to her sexual harassment complaint.

Defendant Rail Unlimited Inc. 210 E. 89th Street,

over Den Mar Inc.'s daily operations, payroll, and issues related to personnel matters. Rail Unlimited was party to Plaintiff's wrongful termination decision, and Rail Unlimited was significantly involved in the subsequent EEOC investigation. These two entities, (Den Mar Inc. and Rail Unlimited Inc.) effectively constitute a single employer.

As a result, Rail Unlimited and Den Mar Inc. are both liable in this action. Defendants Den Mar Inc. and Rail Unlimited Inc. failed to exercise reasonable care to correct promptly and prevent prohibited Title VII activity that unreasonably interfered with Plaintiff' work performance.

Defendants Den Mar Inc. And Rail Unlimited Inc.'s failures included, failure to prevent sexual harassment, failure to prevent a hostile work environment (after being notified of the sexual harassment problem), and failure to prevent retaliation. Plaintiff was subjected to a hostile work environment right up to the time of her wrongful termination. The wrongful termination was an act of retaliation because of Plaintiff's protesting a hostile work environment related to her sexual harassment complaint.

As a result of defendants unlawful conduct, Plaintiff has suffered damages in the form of lost wages, lost future wages, emotional pain, personal embarrassment, mental anguish, humiliation, inconvenience, loss of enjoyment, mental anguish, humiliation, inconvenience loss of enjoyment of life and other losses.

suit, back pay with interest, compensatory damages for non economic damages suffered by Plaintiff, (emotional distress, personal embarrassment, humiliation, loss of enjoyment of life, mental anguish) in the amount of $200,000 against each defendant, and punitive damages in an amount to be determined at trial, for such other further relief as the court may deem just and proper.

Respectfully submitted,
s/ Dale Michele Stingley Pro se Plaintiff
5613 Shady Hill Lane
Arlington TX 76016

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U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
2008 FEB 7 AM 11:15
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FT WORTH TX

DALE MICHELE STINGLEY

V. Civil No 4-07CV-673-A

DEN MAR INC.
RAIL UNLIMITED INC.

MOTION FOR SANCTION

Comes now Pro se Plaintiff Dale Michele Stingley, to request sanction against Defendant's counsel Marc J. Wojciechowski pursuant to the provisions of Local Civil Rules LR 83.7, LR 83.9 or LR 83.10.

INTRODUCTION

On January 14, 2008, this honourable court ordered the parties and their respective lead counsel to meet face=-to-face to discuss settlement of this action. Pro se Plaintiff Dale Michele Stingley and Defendant's counsel Marc J. Wojciechowski scheduled this meeting for Frebruary 5, 2008 at 11:00 a.m at the

at the Love Field Conference Center in Dallas, Texas. During that meeting, Defendant's counsel Marc J. Wojciechowski advised the Plaintiff that he was not authorized to practice before this court indicating that he had not satisfied all steps necessary to practice before this honorable court and suggested that he anticipated completing that process.

ARGUMENT

This would be a violation fo this honorable courts direct order which warned all parties that from the time of that order all parties to this action and their counsel, shall strictly comply with the requirements that representation is to be provided by individuals who qualify to practice before this court under the provisions of Local Rules LR 83.7, LR 83.9, or LR 83.10. The courts order clearly states "Each attorney of record who participates in a conference contemplated by Local Civil Rule 7.1 shall be an attorney of record who is admitted to practice before this court pursuant to the provisions of Local Civil Rules LR 83.7, LR 83.9, or LR 83.10. The courts order warned all parties that the court expected strict compliance with the terms of its order and that any party or counsel that failed to cooperate in doing anything required by this order would be subject to sanctions, including dismissal or entry of default without further notice.

CONCLUSION

Therefore , in the interst of truth and justice, and for the reasons specifically set out in this document, Plaintiff hereby moves this honorable Court to Order

"A reasonable inquiry " to determine whether Defendant's counsel Attorney Marc J. Wojciechowski has satisfied all of the courts requirements to be admitted to practice before this court pursuant to the provisions of Local Civil Rules LR 83.7, LR 83.9, or LR 83.10 at the time of the settlement conference. If Defendant's counsel is found to be in violation of this honorable courts direct order, Plaintiff request that the court impose sanctions, or such disciplinary action as the court may deem necessary to impress upon Defendat's counsel the importance of counsel following the directives of this honorable court in the pursuit of justice. Plaintiff also request that this honorable court sanction the February 5, 2008 settlement meeting null and void and that the court order rescheduling of a face to face settlement meeting. Pro se Plaintiff also request compensation for expenses incurred to make provisions to attend that meeting and any subsequent rescheduled meeting ordered by this honorable court if Defendant's counsel is found to be in violation of the direct order of this honorable court. Plaintiff believes that if claims against Defendant's counsel are substantiated the conduct is particularly egregious not only because it undermine the authority of this honorable court and our system of justice, but Plaintiff feels this is an attempt to undermine Plaintiffs's Pro se status and lack of legal experience.

Respectfully submitted
s/ Dale Michele Stingley Pro se
5613 Shady Hill Ln
Arlington, TX 76016
817 654.2520

Supreme Court, U.S.
FILED
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No. 09-823

In The

Supreme Court of the United States

Dale Michele Stingley

Petitioner

V.

Den Mar Inc.
Rail Unlimited Inc.

Respondent

PETITION FOR REHEARING

Pro Se Petitioner
Dale Michele Stingley
5613 Shady Hill Lane
Arlington, TX 76016
817 495-2937

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I. INTRODUCTION

Only exceptional circumstances justify this Courts granting of a Petition for Rehearing. Petitioner hereby submits, that this Petition for Rehearing is based on circumstances that are indeed exceptional and of monumental judicial importance.

During a ceremony marking the 200th anniversary of the U.S. Constitution, U. S. Supreme Court Justice Thurgood Marshall spoke the following words. "Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue." Justice Marshall gave credit for progress "To those who refused to acquiesce in outdated notions of "liberty," "justice," and "equality," and who strived to better them." [1]

During pivotal times in our nations history, when the path to true justice has seemed the most obscure, the citizenry has always rested in the expectation that those entrusted with the powers of national leadership would at all times remain true to the constitutional principals of justice and equality for all the people.

There is a growing undercurrent of concern that the fundamental constitutional rights of litigants are being abridged by Congress and U. S. Circuit Courts.

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[1] Justice Thurgood Marshall, The Annual Seminar of the San Francisco Patent And Trademark Law Association in Maui, Hawaii May 6, 1987

These concerns emerged as the result of a two track system of justice, initiated by the Judicial Conference in 1964, in an effort to reduce the number of published opinions with unpublished opinions, in violation of Article III, and the Fifth and Fourteenth Amendments of the Constitution of the United States.

In this instant case, Petitioners appeal to the U. S. Fifth Circuit Court of Appeals has been subjected to the separate and unequal process of local governing rules 5TH CIR. R. 47.5.1, 47.5.2, in violation of her constitutional guarantee of due process of law, found in the Fifth and Fourteenth Amendments of the U. S. Constitution which in relevant part, "prohibit all levels of government (state and federal) from unfairly depriving individuals of their basic constitutional rights to life, liberty, and property without due process of law", and her Fourteen Amendment right to "equal protection of the laws".

The Panel's use of non presidential disposition of Petitioner's case is a violation of Article III of the Constitution, in ways that will herein be described.

II.

ARGUMENT

Not since the era of *Plessy v Ferguson* 163 U.S. 537 (1896), has a rule of law, flawed in the principals

of the separate but equal doctrine, been sanctioned by our government and courts. The "separate but equal" doctrine sanctioned by the U.S.Supreme Court in Plessy, served to justify segregation in many states for the next half century.

The use and misuse of 5TH CIR. R. 47.5.1, 47.5.2, which sanction the doctrine of separate but equal in the federal court system, represents actual judicial abuse demonstrated in this instant case, and massive potential for abuses that violate the constitutional rights of litigants that are similarly situated.

Plessy represented a futile attempt to provide separate but equal transportation and public accommodations for people of color, with the proposition that separate could be equal. That doctrine was later found to be unconstitutional and 5TH CIR. R. 47.5.1, 47.5.2, are both flawed and unconstitutional for some of the same reasons.

U. S. Supreme Court Justice John Harlan in his dissent to Plessy v Ferguson wrote in relevant part, "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches". *Plessy v Ferguson* 163 U.S. 562 (1896)

Justice Harlan's dissent, which was later vindicated by the landmark *Brown v. Board of Education of Topèka,* 347 U. S. 483 (1954) case, directly challenged the separate but equal doctrine for being a mirage of justice, noting that it was "disguised" as a just proposition, but actually had the effect of separating citizens by class and race. Indeed, he deemed it a doctrine that was hostile to the spirit and the letter of the constitution.

In the Brown opinion, Chief Justice Warren made plain that a doctrine of separate but equal was unconstitutional and "had no place in our nations educational system because it denied black children equal protection of the laws guaranteed by the Fourteenth Amendment" *Brown v Board of Education* ,[347 U.S. 483, 484]. The same constitutional principals articulated by Chief Justice Warren in Brown when denouncing the separate but equal doctrine in education, apply to the administration of justice in our federal judicial system. Since the government provides citizens the opportunity to redress grievances, such an opportunity is a right which must be made available to all on equal terms. Anything less deprives of equal protection of the law guaranteed by the constitution.

In 2007, faced with a groundswell of complaints from judges, attorneys, and the public regarding decisional inconsistencies, and the constitutionality of unpublished decisions, Fed. R. App. P. 32.1 was enacted to prohibit disallowing citation of unpublished opinions in all federal courts.

Interestingly, minutes from a 2003 mid-year meeting of the Judicial Conference Committee on Rules, held in Philadelphia Pennsylvania, reflect that Judge Samuel Alito, then Chair of the Advisory Committee on Appellate Rules, addressed the proposed new Fed. R. App. P. 32.1 by stating the proposed rules was, "intended to improve the perception of fairness and openness in appellate decision-making". [2]

These words by Judge Alito, "intended to improve the perception of fairness" are very telling and serve as an indictment on Fed. R. App. P. 32.1, bringing to mind Judge Harlan's dissenting remarks in Plessy, where he denounced "The thin disguise" of equality in the separate but equal doctrine, *Plessy v Ferguson*, 163 U.S. 537, 562]. Justice must be more than a mirage or "perception", it must of necessity be a reality in truth, not mere pretense.

Now, more than a hundred years after Plessy, litigants are subjected to and processed by an appellate rule that by Judge Alito's own admission is designed to improve the publics "perception" of the fairness of the appellate process. Judge Alito also emphasized "the narrowness" of Fed. R. App. 32.1 at that same meeting, explaining that " it does not address the propriety or constitutionality" of issuing opinions that lack precedential value.

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2 Judge Samuel Alito, Judicial Conference Committee on Rules, Philadelphia Pennsylvania 2004

A. QUESTIONS ABOUT THE CONSTITUTIONALITY OF UNPUBLISHED OPINIONS ABOUND

These observations by Judge Alito raise serious questions about enacting a rule that currently affects 80% of federal litigants who appeal cases, while questions of the constitutionality and propriety of unpublished opinions go unanswered. The truth is, the constitutionality of unpublished opinions or non precedential opinions has been questioned for years. Inherent in this flawed policy are critical problems and threats to judicial integrity. Fundamental problems result from the level of discretionary power given appellate courts with the absence of sufficient judicial review, and the lack of public scrutiny.

Justice Thurgood Marshall warned against unpublished opinions and the secret body of law they would create calling both "plainly wrong" *County of Los Angeles v. Kling,. 474 U.S. 936, 938 (1985) (Marshall, J., dissenting)*

"Unpublished opinions not selected for publication are less well reasoned and not as complete as those intended for publication. It is well known that judges may put considerably less effort into opinions that they do not intend to publish." *Wilson v. Layne, 141 F.3d 124 (4th Cir. 1998)*(Murnaghan, J., dissenting) It is general knowledge within the circuits that unpublished opinions are segregated into, and processed by a second class judicial standard.

Given the idiosyncrasies and nuances each case presents, it is un reasonable that 80% of cases merely warrant a cookie cutter form of justice and it is more likely cases are subjected to an unacceptable level of arbitrary judicial preconceptions .

In Anastasoff v United States 233 F.3d 898 (8th Circuit 2000) Judge Arnold struck down Fed. R. App. P. 28A(i) as unconstitutional where it expands judicial power beyond the bounds of Article III. *Anastasoff,* 223 F.3d at 900. Through a review of history surrounding Article III and the doctrine of precedent, Judge Arnold found that the framers intended that every case should become binding precedent, (See *Id. at 903-905*). Petitioner concurs.

Arguments for and against Judge Arnold's interpretation of the intent of Article III abound and beg the attention and direction of this high court. An additional argument that will herein be made, is based on what Article III clearly states. " The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Article III, U. S. Constitution.*

The Article III power vested in Congress to "from time to time establish courts", shows the framers undoubtedly understood that changing times would mean changes in the demands on the federal judiciary, and the need for congress and the courts to adjust to changing demands. At present, 80% of all appellate cases are disposed of by unpublished opinions, and are handled in a manner that is separate and unequal from that of published opinions.

As our nations population continues to increase, so will demands on the federal judiciary. We are on an unsustainable path of increasing appellate unpublished opinion,s while leaving the judicial privilege of published opinions to a select few.

In the face of certain growth in population as the union grew and developed, the Framers surely did not intended that courts merely resort to a flawed separate but equal process that disposes of cases primarily by elimination, rather than accommodation that is fair and equitable. Congress is not fettered or restricted to policies of the status quo, but in the interest of efficiency, resorted to an unjust process that subjects 80% of federal litigants to a separate and unequal judicial process reminiscent of a doctrine this nation has long since put away

B. UNPUBLISHED OPINIONS AT THE EXPENSE OF JUSTICE AND EQUALITY

"There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Plessy v Ferguson* 163 U.S 537, 557 (J. Harlan dissenting)

The process of reducing appellate decisions to published or unpublished, or subjecting litigants to class A or class B, places certain litigants in a more privileged class, while subjecting others to a less privileged class, and predisposes the latter to a reduced likelihood of review.

While the U. S. Supreme Court technically does not deny Certiorari because an opinion is unpublished, statistics clearly show a disproportionate majority of Petitions for Certiorari are granted in cases with published opinions.

In *Brown v Board of Education*, 347 U.S. 483, 492, (1954), inequality was found in that "specific benefits enjoyed by white students were denied to children of color of the same educational qualifications". In this instant case, specific benefits enjoyed by litigants of published opinions were not enjoyed by Petitioner, more specifically, the same level of judicial care and review given published opinions. The denial of judicial equality has deprived Petitioner of equal protection of the laws guaranteed by the Constitution.

Within this separate but unequal judicial system, constitutional checks and balances are virtually nonexistent. Article III of the Constitution in plain unequivocal terms vested the ultimate reviewing powers of the Federal court system in the U. S. Supreme Court. No credible argument can be made that sufficient reviews are conducted to ensure the integrity of this process that designates 80% of appellate cases as non-precedential or unpublished. Petitioner has been subjected to judicial abuses in the Fifth Circuit violating her right to due process with no chance of vindication or judicial accountability unless a Petition for Rehearing is granted.

C. THE PSYCHOLOGY OF INJUSTICE

"Our Framers established a careful set of procedures that must be followed before federal law can be created under the Constitution—vesting that decision in the political branches, subject to checks and balances. U. S. Const., Art. I, §7". Medellín v. Texas, 552 U.S. 491 (2008). (Opinion) Chief Justice John Roberts

Many issues may be argued related to the policy and practice of unpublished opinions. What is clear, is the fact that the framers intended that there be checks and balances subject to the U. S. Constitution in federal law and policy. What is equally clear is those checks and balances designed to prevent governmental abuses do not exist in the policy and practice of unpublished opinions. "Unpublished dispositions do not get any meaningful en banc review-and couldn't possibly. To cite them as if they represented more than the bare result as explicated by some law clerk or staff attorney-is a particularly subtle and insidious form of fraud. [3]

These remarks, by sitting Ninth Circuit Federal Judge Alex Kozinski, represent what many fear is the psychology and mentality of many of those in control of this segregating judicial practice . A judicial environment exist where due diligence is not encouraged in all cases though justice demands it. This process represents a second class system of justice for those subjected to it.

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[3] U S Circuit Judge Alex Kozinski, Letter to Judge Samuel Alito, Re Proposed Federal Rule of Appellate Procedure 32 1 Jan 16,2004

The psychology related to this unjust system and process is a two way street. When the public perceives that an appeal in the U. S. Court of Appeals is an exercise in futility, the people develop a no confidence mentality in that system. Justice O'Connor wrote, "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood of S.E. Pa. V Casey* 505 U.S. 833, 844 (1992)

"Opinions dealing with the easy application of established law to specific facts have little use as precedent for other litigants or posterity. A brief written opinion is all that is necessary to inform the litigants of the outcome and the reasons for it."

"Responsible appellate judges must devote more time to an opinion that changes the law or clarifies it in an important way (and may thus affect many litigants in future cases) than to an opinion that simply applies well-established law to specific facts (and thus affects solely the litigants at hand)".

These were remarks made by Judge Samuel Alito in June of 2002. Judge Alito's remarks make clear that the two classes of cases are, and based on his stated position, should be treated differently. Judge Alito, like many proponents of the unpublished opinions process, justify that position primarily based on

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Judge Samuel Alito, Unpublished Judicial Opinions Hearing of The Committee on The Judiciary House of Representatives, Second Session June 27, 2002

judges, their time, and the need to run courts efficiently. A consideration found missing in this argument however, is the rights of "The People". The Constitution is a document designed to first and foremost protect the rights of the people and to prevent the government from abridging those rights.

Judges and their time constraints are considerations the Framers clearly addressed in Article III of the Constitution by vesting Congress with the power to "from time to time create courts". Given this option, any attempt to justify unpublished opinions in the interest of efficiency of the courts, and above the rights of litigants, does not represent a compelling governmental interest, and is therefore unconstitutional. The price for judicial demands on the courts is not to be exacted on the backs of those seeking justice. Petitioner and 80% of federal litigants are subjected to a substandard process where judicial abuses are and can be swept away with no accountability, in the name of efficiency in the courts.

It is noteworthy that proponents of unpublished opinions do not address the lack of judicial checks and balances needed to ensure protection of the rights of litigants, or the many constitutional questions surrounding this process, or the fact that many unpublished opinions are not even written by judges but are delegated to law clerks and lawyers who are not judges. This system of justice structurally subordinates some litigants and privileges others in clear violation of due process, and the 5th and 14th Amendments of the U. S. Constitution.

CONCLUSION

"Justice is most evenly administered when similarly situated parties are treated the same" *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

The need for this High Court to address the constitutionality and propriety of unpublished opinions has reached critical mass. Our system of justice requires more of appellate judges than discriminatory treatment of appellate cases. Acquiescence allows perpetuation of an unjust system.

This is about the rights of everyday citizens who are routinely denied judicial rights. This Petition is submitted by the daughter of a man who died a 100% service connected disabled U. S. Army veteran, and the sister of a U. S. Army Sergeant who served two tours in Iraq to secure freedom for others. The irony is, Petitioner has been denied the justice they willingly served to defend. Petitioner has been subjected to judicial abuses that rise to the level of fraud on the court because the level of malfeasance evidences a culture of systematic abuse, facilitated by a separate and unequal federal judicial system including judges advocating for the defendants, ignoring or misstating facts that were alleged, and misrepresenting precedents, in this extreme case of sexual harassment. A review of the monumental issue of unpublished opinions will serve to confirm suspicions of injustice, or it will dispel all doubts.

For all of the foregoing reasons, Petitioner respectfully submits this Petition for Rehearing.

Respectfully submitted,

Dale Michele Stingley
5613 Shady Hill Ln
Arlington TX 76016
817 495-2937

CERTIFICATION

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Dale Michele Stingley
Pro se Petitioner